

COPY

1 Peter J. McNulty SBN 89660
 2 MCNULTY LAW FIRM
 3 827 Moraga Dr.
 4 Los Angeles, CA 90049
 Telephone: (310) 471-2707
 FAX: (310) 472-7014
 Email: peter@mcnultylaw.com

5 [Additional Counsel on Signature Page]

6
7
8

9 **UNITED STATES DISTRICT COURT**
 10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12
13
14
15

In re UNITED PARCEL SERVICE
 "AIR-IN-GROUND" MARKETING
 AND SALES PRACTICES
 LITIGATION

16

THIS DOCUMENT RELATES TO:

17
18

2:10-CV-00733-GW-PJW Designer
 Imports International, Inc. v. United
 Parcel Service, Inc., et al.

19
20

2:10-CV-00734-GW-PJW Pocino
 Foods Company, et al. v. United Parcel
 Service, Inc., et al.

21
22

2:10-CV-04350-GW-PJW Arapahoe
 Hyundai, LLC v. United Parcel
 Service, Inc., et al.

23
24

2:10-CV-04352-GW-PJW Owens
 Financial Group, Inc. v. United Parcel
 Service, Inc., et al.

25
26

27
28

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 LOS ANGELES

2010 OCT 19 PM 3:07

FILED

MDL No. 2153

Case No. 2:10-md-02153-GW-PJW

**SECOND AMENDED
 CONSOLIDATED CLASS
 ACTION COMPLAINT**

JURY TRIAL DEMANDED

1. Violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO");
2. Breach of Contract;
3. Fraudulent Inducement;
4. Breach of the Implied Covenant of Good Faith and Fair Dealing; and
5. Unjust Enrichment

1 Lead Plaintiffs Pocino Foods Company; Designer Imports, International,
 2 Inc.; Arapahoe Hyundai, LLC; and Owens Financial Group, Inc. (sometimes
 3 hereinafter collectively referred to as “**Plaintiffs**”), by and through their attorneys,
 4 bring this action against Defendant United Parcel Service, Inc., a Delaware
 5 corporation; Defendant United Parcel Service, Inc., an Ohio corporation; Defendant
 6 United Parcel Service General Services Co., a Delaware corporation; and
 7 Defendant United Parcel Service Co. d/b/a United Parcel Service Co. (Air), a
 8 Delaware corporation (collectively referred to as “**UPS**,” “**Defendant**,” or
 9 “**Defendant UPS**”); and Defendants DOES 1 through 10, inclusive (collectively
 10 referred to as “**Defendants DOES**”), for violations of the Federal Racketeer
 11 Influenced and Corrupt Organizations Act (“**RICO**”), 18 U.S.C. § 1961, *et seq.*; for
 12 breach of contract; for fraudulent inducement; for breach of the implied covenant of
 13 good faith and fair dealing; and for unjust enrichment, individually and on behalf of
 14 all other similarly situated individuals and entities (the “**Class**”). Plaintiffs assert
 15 the claims alleged herein upon knowledge as to their own acts and otherwise upon
 16 information and belief as follows:

17 **I. INTRODUCTION AND BACKGROUND**

18 **1.** This is a civil action seeking monetary damages for UPS’s unfair and
 19 fraudulent conduct, and UPS’s breaches of its agreements with Plaintiffs and the
 20 Class. UPS’s misconduct took a variety of forms, but it includes, most
 21 significantly: (1) charging Plaintiffs and the Class a surcharge for aviation fuel for
 22 shipping packages that UPS knows, in advance, will be delivered only by ground
 23 truck (“Fuel Surcharge Claim”) and (2) inducing Plaintiffs to purchase and charging
 24 them far more money for “air” shipping services that UPS knows, in advance,
 25 Plaintiffs do not need and will never receive (“Air Service Claim”). These separate
 26 and independent fraudulent charges levied on Plaintiffs and the Class form the basis
 27 for this Complaint. UPS’s misrepresentations and material omissions at the time of
 28 sale result in the customers paying unjustifiable surcharges for jet fuel that UPS

1 never uses and two to three times the price needed to ship their packages.

2 2. Upon information and belief, UPS misleads Plaintiffs and Class
 3 members into purchasing unnecessary and expensive Next Day Air services more
 4 than 350,000 times each day. Also upon information and belief UPS collects more
 5 than \$5 million per day from the sale of these services, which UPS knows, before it
 6 takes Plaintiffs' and the Class member's money, it will never deliver.

7 3. Millions of customers a day, including Plaintiffs and other Class
 8 members, purchase UPS air services, such as "Next Day Air" and "2nd Day Air," to
 9 ship domestic letters, packages, and freight (collectively "**packages**").

10 4. Plaintiffs and Class members select air shipment, and pay UPS the
 11 relatively high price for it, reasonably believing that when they purchase Next Day
 12 Air and 2nd Day Air services, UPS will provide air shipment within one or two
 13 days, respectively. Plaintiffs and Class members also reasonably believe that they
 14 are getting something for their money and that UPS is not charging them for higher
 15 priced air services, but then secretly delivering *exactly* what the customer would
 16 have received for substantially less money if he had chosen to purchase "Ground"
 17 shipping service instead.

18 5. However, despite UPS's agreement to provide (and acceptance of
 19 payment for) air shipping services (and a surcharge for aviation fuel), each day UPS
 20 systematically and secretly substitutes far cheaper *ground* shipment for tens of
 21 thousands of packages Plaintiffs and Class members have paid to ship by *air*.
 22 UPS's organized and nationwide program for identifying all air shipments that
 23 feasibly can be shipped by ground without missing the delivery deadline and
 24 rerouting those packages to ground is **known internally at UPS** as the "**Air-In-**
Ground" program. UPS has been using this program to swell its profits at
 25 customer expense since 1995.

26 6. Because of the time and effort UPS has devoted to orchestrating and
 27 perfecting its Air-In-Ground scheme, UPS knows at the moment a customer

1 contracts to ship a package by air whether UPS will, in actuality, ship that package
 2 by ground. Indeed, because there are locations around the country between which
 3 UPS has predetermined to ship *all* 2nd Day Air and/or Next Day Air packages by
 4 ground, UPS (but not the customer) knows that the air services it sells between
 5 these locations do not even exist and that, in truth, ground is the *only* shipping
 6 option available.

7 **7.** Yet UPS never discloses that Plaintiffs and Class members are paying
 8 for air shipping services that are not actually available and that Plaintiffs and Class
 9 members will never receive. Instead, UPS tricks Plaintiffs and Class members into
 10 believing that the steep premiums they pay for air service are meaningful, by
 11 offering multiple options where no options actually exist. UPS also indicates to
 12 Plaintiffs and Class members at every turn that they are receiving the air services
 13 they selected and paid for. This is all done for the purpose of ensuring that as many
 14 customers as possible continue to pay for phantom air shipping services that UPS
 15 knows it will never provide.

16 **8.** Thus, at the time of sale, UPS knows with certainty and has pre-
 17 determined that certain customers' air packages will be delivered by ground. Based
 18 on its internal analyses of ground shipping times and its sorting procedures, when a
 19 customer asks for air shipment from any location in the country to any other
 20 location, UPS knows, in advance, whether that shipment will actually be shipped
 21 solely by ground.

22 **9.** For many Class members, the time of delivery guarantee is *identical*
 23 whether the Class member ships by an "Air" service or by "Ground." For example,
 24 a Class member sending a package from San Francisco to Los Angeles on a
 25 Monday will get a time of delivery guarantee of "end of day" Wednesday whether
 26 he ships by Ground or pays about twice as much for 2nd Day Air. Because the time
 27 of delivery guarantee is the same, Class members who choose 2nd Day Air over
 28 Ground in this situation can *only* be choosing to pay more because they believe they

1 will get air shipment, and not ground shipment. But, based on the Air-In-Ground
 2 Program, *all* 2nd Day Air packages from San Francisco to Los Angeles are actually
 3 shipped by Ground service, regardless of what service the Class member buys.
 4 Unlike the unwitting Class member, UPS knows in advance that the Class
 5 member's package will be handled in exactly the same way, that is shipped by
 6 Ground, whether the Class member pays double the price for a non-existent "2nd
 7 Day Air" service or not.

8 **10.** For other Class members who seek and pay for a time of delivery
 9 before the end of the day, UPS knows that the earlier time of delivery promise will
 10 be met whether that customer purchases an "Air" service or "Ground" service. For
 11 example, a Class member sending a package from Washington, D.C. to a major
 12 office building in Baltimore may be promised a 10:30 AM delivery if he pays \$30
 13 for Next Day Air and only an "end of day" delivery if he ships by Ground. UPS
 14 knows in advance of the customer making the purchase, however, that packages
 15 from Washington, D.C. to that office building will be delivered before 10:30 AM,
 16 regardless of what service the Class member purchases. That is, whether the class
 17 member buys Ground or Next Day Air, he will actually receive Ground service, and
 18 the package will arrive at the same time. UPS keeps the true time of delivery facts,
 19 which it has internally, from Class members to trick them into buying much more
 20 expensive Next Day Air service that is not needed and that UPS will not provide
 21 regardless of the service selected by the Class member. Indeed, the Class member
 22 has no avenue, whether by using the UPS website or otherwise, for figuring out that
 23 there is absolutely no reason for him to pay the steep premium for Air shipping to
 24 get a delivery time before the end of the day.

25 **11.** Thus, for both of these sets of Class members, UPS knows with
 26 certainty, at the time it takes the Class member's money for "Air" shipping
 27 services, that the Class member is *literally* paying something for nothing. UPS will
 28 not provide the "Air" shipping service purchased by these Class members; instead,

1 UPS will provide only “Ground” service. UPS (but not the Class member) knows
 2 that the package will receive identical treatment -- delivery by Ground service at the
 3 very same time -- whether the Class member pays for Ground or pays two or three
 4 times as much for one of UPS’s “Air” services. UPS (but not the Class member)
 5 also knows that no jet fuel will ever be used in the course of the delivery, although
 6 a surcharge for jet fuel will be added.

7 12. Of course, UPS never informs the Class member that he is paying an
 8 unnecessarily high price to deliver his package, that there is no air service available
 9 for the shipment he is requesting and, in many cases, that he could obtain the same
 10 delivery time by purchasing the far less expensive Ground service. The UPS
 11 documents, including the original shipping document the Class member uses to
 12 order his service (the “**Shipping Document**,” examples attached as Exhibits 1 and
 13 2), the subsequently provided shipping documents, such as tracking reports and
 14 invoices (the “**Subsequent Shipping Documents**,” attached as Exhibits 3-29),
 15 UPS’s online terms, which it calls a Tariff/Terms and Conditions of Service (the
 16 “**Website Terms**,” attached as Exhibit 30) and its Rate and Service Guide (the
 17 “**Guide**,” attached as Exhibit 31), repeatedly affirm that customers will get “Air”
 18 service and that they will get the service they selected, and not some other service
 19 (e.g., Ground) that they could have purchased, but chose not to.

20 13. Moreover, apparently recognizing that its Website Terms nowhere
 21 permitted UPS to levy a fuel surcharge based on jet fuel for packages that were
 22 actually shipped by ground, UPS changed its terms in January 2009 in an
 23 unsuccessful attempt to immunize its misconduct.

24 14. Under these circumstances, to implement the reasonable expectation of
 25 the Plaintiffs (and other Class members), the shipping contracts must be interpreted
 26 in favor of the shippers who did not know (and could not have known) of UPS’s
 27 Air-In-Ground program.

28 15. Plaintiffs and Class members reasonably understood and expected that

1 they would actually receive the “Air” level of service they selected and that it was
 2 necessary to pay the much higher price for such service. The Plaintiff shippers also
 3 reasonably expected that they would be charged the higher surcharge for aviation
 4 fuel only for packages shipped by an “air” level of service. They never suspected,
 5 and UPS never informed them, that they were paying substantially higher prices for
 6 “Next Day Air,” “2nd Day Air,” or other “Air” services only to secretly have UPS
 7 deliver “Ground” service, which Plaintiffs and the Class could have received for far
 8 less money.

9 **16.** Plainly, UPS’s fraudulent scheme is specifically intended to sell more
 10 expensive and wholly unnecessary air services. UPS’s deception and silence as to
 11 how packages are really handled is intended to (and thousands of times per day
 12 actually does) fraudulently induce Class members into purchasing unnecessary and
 13 far more expensive air services that they never get. If UPS told Class members the
 14 truth at the time of sale, no Class member would pay, for example, \$21.00 for a
 15 Next Day Air delivery or \$14.00 for a 2nd Day Air delivery that he could obtain for
 16 \$7.00 by Ground. No shipper would have selected and paid for an “Air” level of
 17 service if the shipper knew that UPS had predetermined that it would not provide
 18 that level of service, and would instead provide the much cheaper “Ground”
 19 service. No shipper would pay the much higher surcharges for aviation fuel for
 20 shipments sent by ground, if the shipper knew the true facts relating to the Air-In-
 21 Ground program.

22 **17.** UPS fully understood that its Air-In-Ground scheme could not succeed
 23 if shippers knew the truth. For these reasons, UPS concealed these material facts
 24 and made it literally impossible for shippers to determine which, if any, air
 25 shipments had been shipped by ground. UPS intended to suppress and conceal the
 26 true facts regarding the Air-In-Ground program to affirmatively deceive its shippers
 27 for the purpose of extracting the much higher prices for “air” level of service and
 28 for fuel surcharges for jet fuel. UPS affirmatively knew and intended that its

1 shippers would be tricked and deceived by the Air-In-Ground program.

2 **18.** UPS's conduct not only breaches its contracts with Plaintiffs and Class
 3 members, it also constitutes fraud actionable under Federal law. This action seeks
 4 recovery of damages, going back to 1995, for all persons and entities within the
 5 United States (i) who paid a surcharge for aviation fuel that UPS never used to ship
 6 their packages; and/or (ii) who paid charges for an air shipment for which UPS
 7 substituted ground shipment through the Air-In-Ground program; and (iii) who did
 8 not directly pass those charges on for payment by their customers or other third
 9 parties.

10 **19.** UPS's Corporate Code of Conduct states that UPS is required "to
 11 conduct business fairly, honestly, and ethically." Its Code of Conduct also states
 12 that "[w]e do not misrepresent our services or products in any sales or promotional
 13 efforts." UPS's Code of Conduct further goes on to claim, "We communicate
 14 clearly, so that our customers understand the terms of our business relationships,
 15 including contracts, performance criteria, schedules, prices, and responsibilities."

16 **20.** Directly contrary to these claims of corporate good citizenship,
 17 morality, and clarity, UPS, through the deliberate acts and fraudulent scheme
 18 described in this complaint, has intentionally defrauded Class members out of
 19 billions of dollars.

20 **II. THE FRAUDULENT SURCHARGE FOR AVIATION FUEL**

21 **21.** In approximately 2000, UPS began assessing surcharges for aviation
 22 fuel for air shipments and surcharges for diesel fuel for ground shipments.
 23 Surcharges for aviation fuel are substantially higher than diesel fuel surcharges.
 24 (*See Exh. 5 (Delivery Service Invoice for Plaintiff Pocino, showing a 6.3% ground*
 25 *fuel surcharge and 19.5% air fuel surcharge)).* UPS claimed that the surcharges for
 26 aviation fuel are a necessary means to compensate UPS for the rising cost of jet
 27 fuel. In fact, UPS has utilized the surcharge for aviation fuel as part of its scheme
 28 to fraudulently charge Plaintiffs and the Class additional money for air shipments

1 that UPS covertly shipped by ground.

2 **22.** UPS assesses surcharges for aviation fuel on Plaintiffs and Class
 3 members who contract for air services, including Next Day Air and 2nd Day Air
 4 service. Despite the fact UPS has pre-determined air packages that will be switched
 5 to ground shipment, and never ships those air packages by airplane, UPS still
 6 collects surcharges for aviation fuel from those Next Day Air and 2nd Day Air
 7 customers. UPS thereby charges Plaintiffs and the Class for the cost of jet fuel that
 8 it never uses.

9 **23.** Prior to January 5, 2009, the Website Terms' provision on fuel
 10 surcharges read simply, "UPS reserves the right to institute a fuel surcharge on
 11 some or all shipments without prior notice. This surcharge is subject to adjustment
 12 monthly. This surcharge may apply to any domestic or international transportation
 13 or other charges, including, but not limited to, any accessorial charge or surcharge.
 14 This surcharge will be applied to such services and for such periods as UPS, in its
 15 sole discretion, may determine necessary. The current fuel surcharge is described
 16 at ups.com." (Exh. 32 at page 31 of 48, section V.F. (UPS Website Terms dated
 17 August 4, 2008) ("**Pre-2009 Fuel Surcharge Clause**"). On UPS.com, UPS lists
 18 the shipping services to which the diesel fuel surcharge applies (UPS Ground
 19 Commercial, UPS Ground Residential, UPS Hundredweight Ground Service, and
 20 UPS Standard) and to which the jet fuel surcharge applies (UPS Next Day Air Early
 21 A.M., UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air A.M., UPS
 22 2nd Day Air, UPS 3 Day Select, UPS Worldwide Express Plus, UPS Worldwide
 23 Express, UPS Worldwide Saver, and UPS Worldwide Expedited).

24 **24.** UPS's Website Terms do *not* permit UPS to assess surcharges for
 25 aviation fuel for packages that UPS elects to ship by ground. They state that a
 26 surcharge for aviation fuel will be added to packages shipped by Next Day Air, 2nd
 27 Day Air and other Air services, but they in no way authorize UPS to charge a
 28 surcharge for jet fuel when UPS *actually ships* the packages by Ground. As

1 specifically provided in the Website Terms, Ground shipments must be subject to
2 the diesel fuel surcharge. Moreover, nothing in UPS's Pre-2009 Fuel Surcharge
3 Clause provided any notice to Plaintiffs and Class members regarding UPS's
4 scheme to ground-out air service packages while continuing to charge air rates and
5 an additional surcharge based on aviation fuel.

6 **25.** Nor does any language in the description of UPS's fuel surcharge at
7 www.ups.com remotely provide notice of UPS's scheme to charge surcharges for
8 aviation fuel to Plaintiffs and Class members for packages shipped by ground
9 service. (See Exh. 33 ("Fuel Surcharge" webpage from www.ups.com)).
10 Moreover, a reasonable shipper viewing the portion of the UPS website specifically
11 labeled "Fuel Surcharge" would see nothing to suggest that he should look
12 elsewhere for evidence of such a scheme.

13 **26.** Since the fuel surcharge purported to reimburse UPS for the cost of
14 fuel expended in transportation, Class members reasonably believed that UPS's
15 diesel fuel surcharge applied to Ground service packages, while UPS's surcharge
16 based on aviation fuel applied to packages transported by air.

17 **27.** UPS recently changed the Fuel Surcharge Clause in a cynical attempt
18 to avoid liability for their fraudulent surcharges. The January 5, 2009 UPS Website
19 Terms, on page 29 of 48, at section V.F. (**"Post-2009 Fuel Surcharge Clause"**)
20 (Exh. 34), added to the old language on fuel surcharges, "Regardless of the mode of
21 transportation used, the effective fuel surcharge for the service selected by the
22 shipper shall apply." Prior to 2009, no clause suggested in any manner that the fuel
23 surcharge would not directly relate to the method of shipment (*i.e.*, that the diesel
24 fuel surcharge would apply to ground transportation and the jet fuel surcharge to air
25 transportation), which is what reasonable customers would believe and Plaintiffs
26 believed.

27 **28.** The Post-2009 Fuel Surcharge Clause contains the same ambiguities
28 and internal contradictions arising from the "mode of transportation" language that

1 is discussed at length in Section V.C. below. Thus, even for shipments made after
2 the change to the Fuel Surcharge Clause, no reasonable customer would expect to
3 pay a premium for jet fuel that UPS knows in advance it will never use. In any case,
4 this change to the Fuel Surcharge Clause was made *after* the huge bulk of
5 Plaintiffs' and Class members' shipments. Thus, nothing in the UPS Website
6 Terms permits UPS to impose a surcharge based on aviation fuel for packages that
7 use no aviation fuel whatsoever.

8 **29.** UPS applies surcharges for aviation fuel to air shipments that UPS, in
9 actuality, ships by ground, as another means of protecting its Air-In-Ground
10 scheme from disclosure. If UPS did not impose the surcharge for aviation fuel, the
11 assessment of a ground diesel fuel surcharge for a purported air shipment package
12 could alert a shipper to the scheme. The knowing assessment of inapplicable
13 surcharge for aviation fuel to ground-delivered packages is part of UPS's concerted
14 effort to perpetuate the Air-In-Ground scheme and to shield it from the public eye.
15 The surcharge for aviation fuel also is a means to obtain additional, unwarranted
16 profits at the expense of Plaintiffs and the Class.

17 **30.** The Fuel Surcharge Clause, particularly prior to January, 2009, does
18 not permit UPS to assess surcharges for aviation fuel for ground shipments.
19 Moreover, even after UPS modified the language of the Fuel Surcharge Clause in
20 January 2009 to purport to link the fuel surcharge to the service selected, UPS did
21 not materially change the language in its website specifically relating to fuel
22 surcharges. Thus, UPS's webpage entitled "Fuel Surcharges" conflicts with the
23 language of the Post-2009 Fuel Surcharge Clause and does not advise the customer
24 that UPS may charge surcharges for aviation fuel for packages sent by ground.

25 **31.** The inequitable nature of UPS's conduct in assessing fraudulent and
26 unjustifiable surcharges for aviation fuel on Plaintiffs and Class members is
27 highlighted by comments UPS has made to the Surface Transportation Board
28 concerning rail fuel surcharges that were assessed against UPS. Directly contrary

1 to its practice of imposing surcharges for aviation fuel as described herein, UPS
2 argued to the Secretary of the Surface Transportation Board in its September 29,
3 2006 protest letter regarding rail service fuel surcharges that “[f]uel surcharges that
4 are based on a percentage of railroad base rates are inequitable and do not correlate
5 with actual fuel consumption.” UPS further urged the Surface Transportation
6 Board “to implement procedures that would promote uniformity, equity, and greater
7 transparency among railroad fuel surcharge practices.”

8 **32.** Of course in that instance, UPS was the recipient of the inequitable
9 fuel surcharge, which was disclosed to UPS. Here, Plaintiffs and the Class
10 members are the victims of UPS’s inequitable, and undisclosed, surcharge for
11 aviation fuel that is never used. Putting aside the *amount* of fuel actually consumed
12 by UPS in shipping packages for Plaintiffs and the Class, UPS’s surcharge for
13 aviation fuel does not even accurately reflect the *type* of fuel being used.

14 **III. UPS’S INITIATION OF THE AIR-IN-GROUND SCHEME**

15 **33.** UPS developed the Air-In-Ground program around 1995. Prior to the
16 Air-In-Ground program, UPS policy required an air package to be shipped by plane
17 and a ground package to be shipped by ground transportation. The Air-In-Ground
18 program was specifically designed to identify air packages that UPS could transport
19 by ground. The purpose of the Air-In-Ground program is to collect the higher price
20 charged for air transportation, including a surcharge for aviation fuel, while actually
21 providing the much cheaper Ground service.

22 **34.** Prior to implementing the Air-In-Ground program in or around 1995,
23 UPS performed a computer analysis of origin and destination ZIP Codes and the
24 transit time between the various ZIP Codes (“**Time-In-Transit25 allowed UPS to determine whether ground transportation could get air packages to
26 their destinations on time. If UPS can timely transport an air package by ground,
27 UPS substitutes ground service for the purchased air service.**

28 **35.** The Air-In-Ground program uses specially developed transit-time

1 tables (“**Sort Charts**”) to change customer shipments from air transportation to
2 ground transportation. A Sort Chart is a list of ZIP Codes that identifies the
3 destinations that can be reached by ground transportation in one or two days from
4 each of UPS’s regional Service Centers. Unique Sort Charts are posted at each
5 Service Center. The label on the customer’s package provides the destination ZIP
6 Code. The first three digits of the destination ZIP Code are taken into account, and
7 if the destination ZIP Code is on the Sort Chart and the “air” package can arrive on
8 time by ground transportation, UPS will substitute ground service.

9 **36.** The Air-In-Ground program and its Sort Charts were developed by
10 UPS’s Industrial Engineering (“IE”) Department more than a decade ago. UPS
11 employees, working with senior management, established and set goals concerning
12 the percentage of air shipments that would be eliminated through the Air-In-Ground
13 program in each region of the country. UPS’s determined efforts to devise,
14 implement, monitor and improve the Air-In-Ground program demonstrate its
15 premeditated and willful fraud against the Class. Since its inception, UPS’s
16 fraudulent Air-In-Ground program has been carried out on a continuous and
17 national basis.

18 **37.** UPS’s calculated, nationwide scheme results in automatic and pre-
19 determined rerouting of packages. UPS – but not the customer – possesses all the
20 information needed to conclude which air shipments will be shipped by ground.
21 Although UPS knows, based on ZIP Codes and its Sort Charts, which packages will
22 be shipped by ground transportation when a customer presents a package to UPS,
23 UPS nonetheless continues to offer and charge for air shipping services that it
24 knows will never be provided and that, for all intents and purposes, do not exist.

25 **38.** When a customer contracts to send his package with the selected level
26 of service (e.g., Next Day Air), he does not know that UPS has already pre-
27 determined whether his Next Day Air package will actually be shipped by air or
28 ground. UPS does not tell the customer his air package will be shipped by ground

1 or that he will be paying a higher price for a level of service he will not receive.

2 **39.** On the contrary, the Shipping Document through which the customer
3 contracts with UPS for air shipment indicates that the service selected (e.g., Next
4 Day Air), will be the service provided (i.e., shipment by air to arrive the next day).
5 (Exhs. 1-2). With that Shipping Document, Plaintiffs selected the level of service
6 desired (e.g., Next Day Air or 2nd Day Air), and in doing so, reasonably believed
7 that they were purchasing and would receive air shipment with delivery within one
8 or two days, respectively.

9 **40.** Of course, if UPS disclosed its scheme, the customer would not
10 contract for air service, which costs two to three times more than ground, when the
11 customer will receive only ground service, particularly since in many cases the
12 delivery guarantee for air service is exactly the same as for UPS Ground service.
13 Nor would any rational customer agree to pay a surcharge for jet fuel, knowing that
14 no jet fuel would ever be needed.

15 **41.** The contracts between Plaintiffs and UPS consisted of the Shipping
16 Document (examples of which are attached as Exhs. 1 and 2) and, for certain
17 Plaintiffs, the UPS Website Terms and Guide in effect at the time of shipment.

18 **42.** At all relevant times, UPS suppressed and concealed the true facts
19 relating to the Air-In-Ground program. For example, shippers, including Plaintiffs
20 and Class members, can track a shipment on the UPS website, but the website
21 information does not reveal and is designed to conceal whether the package was
22 actually sent by air or ground. UPS internet communications, including website
23 information and email communications to shippers and package recipients,
24 fraudulently indicate that packages that were in fact sent by ground received air
25 service. Similarly, UPS invoices also falsely state that a package was shipped by
26 air when the package was in fact shipped by ground service. In some instances,
27 UPS also affixes labels to packages which further deceive the shipper into believing
28 that his package will be or has been shipped by air. UPS employees ignore these

1 labels for packages that can be shipped by ground.

2 **43.** In contrast, UPS's internal tracking system shows whether a purchased
3 air shipment was sent by air or ground. This allows UPS to identify and track the
4 number and percentage of air shipments for which UPS deliberately substitutes
5 ground transportation pursuant to the Air-In-Ground program.

6 **44.** Due to UPS's knowing and active concealment, misleading actions,
7 and deliberate misrepresentations relating to the Air-In-Ground program, Plaintiffs
8 and the Class could not have reasonably discovered UPS's wrongful and fraudulent
9 diversion of air shipments to ground transportation.

10 **45.** UPS's deliberate substitution of far less expensive ground shipping
11 services is a remarkably lucrative fraud to increase profits. UPS's air transportation
12 costs are much higher than its ground transportation costs. Upon information and
13 belief, the Air-In-Ground program has resulted in false and fraudulent charges to
14 Plaintiffs and the Class that exceed billions of dollars.

15 **46.** These additional fraudulent and unjustifiable charges damaged
16 Plaintiffs and the Class and substantially increased UPS's fraudulently-obtained
17 revenues from its Air-In-Ground scheme.

18 **47.** UPS's actions in substituting ground transportation for packages that
19 UPS had contractually agreed with Plaintiffs and the Class to ship by air
20 transportation, and for which UPS had charged Plaintiffs and the Class air
21 transportation charges, were unconscionable. No reasonable person would contract
22 with and pay UPS for air shipping services if it were known that UPS never
23 intended to provide air transportation but intended at the time of contracting to
24 transport the packages by ground.

25 **48.** The fundamental artifice and scheme by which UPS achieves this
26 purpose involves misrepresentations by UPS (a) that "air" service is actually
27 available when it is not, (b) that "air" service is necessary to obtain delivery at the
28 desired time when packages sent by ground service will be delivered at the same

1 time, (c) that UPS has actually provided the “air” level of service when it has not,
2 and (d) that letters may be shipped only by “air” level of service.

3 **49.** First, UPS has predetermined those shipments under the Air-In-
4 Ground program for which UPS will not provide “air” level of service. Thus, a
5 shipper’s “selection” of an “air” level of service for such shipments is completely
6 illusory. UPS knows with absolute certainty that it is selling the customer a service
7 (e.g., Next Day Air) that does not exist for that shipment and that the customer has
8 selected and paid for a service (Next Day Air) that it will not provide. For over
9 350,000 Next Day Air packages per day, there are no choices or options under the
10 Air-In-Ground program.

11 **50.** Second, UPS falsely represents in its Guide (and in the time-in-transit
12 information on the UPS website) that a shipper must select Next Day Air or Next
13 Day Saver level of service to obtain delivery at a desired time before the end of the
14 day. In fact, in many instances, if the shipper selected ground service, the package
15 would arrive at the same specified time. This is particularly true in the case of
16 shipment to larger urban areas where UPS typically operates two or three separate
17 deliveries throughout the day. For example, a package sent from Birmingham to
18 Atlanta by Ground service will arrive at the same or substantially the same time as a
19 package sent by Next Day Air or Next Day Air Saver. (*See* Exh. 35). UPS falsely
20 represents in the Guide that such Ground shipments will only arrive by the “end of
21 business day.”

22 **51.** Third, the individual shipping transactions also include additional
23 website information and documents created by UPS after the shipper selects an
24 “air” level of service. These documents are “tracking” reports (Exh. 4), “proof of
25 delivery” reports (Exh. 3), and Delivery Service Invoices (“Invoices”) (*see* Exhs. 5-
26 29). These documents are hereafter collectively referred to as the “Subsequent
27 Shipping Documents.” These Subsequent Shipping Documents each falsely
28 represent that UPS has actually provided the “air” level of service selected by the

1 shipper.

2 **52.** In UPS's view of the world, it has the right to operate a concealed
3 "bait and switch" scam on Plaintiffs and Class members under the Air-In-Ground
4 program and thereby extract hundreds of millions of dollars. UPS is wrong. The
5 UPS Website Terms provide no defense as a matter of law to Plaintiffs' RICO,
6 fraudulent inducement, and breach of contract claims based upon UPS's misleading
7 and deliberately deceptive conduct under the Air-In-Ground program.

8 **IV. UPS'S FRAUDULENT AND DECEPTIVE PRACTICES ARE
9 ACTIONABLE UNDER FEDERAL LAWS AGAINST
RACKETEERING**

10 **53.** UPS's actions in diverting to its Ground service packages that UPS
11 had contractually agreed with Plaintiffs and the Class to ship by an Air service, and
12 for which UPS had charged Plaintiffs and the Class surcharges for aviation fuel,
13 were unconscionable. No reasonable person would contract with and pay UPS for
14 air transportation and surcharges for aviation fuel if it were known that UPS never
15 intended to provide air transportation (or to use any jet fuel) but intended at the time
16 of contracting to transport the packages by ground.
17

18 **54.** UPS's conduct with regard to its Air-In-Ground scheme, as described
19 in this complaint, violates the federal Racketeer Influenced and Corrupt
20 Organizations Act ("RICO") (18 U.S.C. § 1961, *et. seq.*). Plaintiffs also
21 specifically allege and describe multiple individual shipping transactions that
22 constitute predicate acts under RICO, a representative sample of which is attached
23 as Appendix A.

24 **55.** The RICO scheme and artifice to defraud Plaintiffs and putative class
25 members is not in any respect limited to the original Shipping Document or
26 Website Terms and Guide (although the Guide contains misrepresentations
27 regarding delivery times). Rather, Plaintiffs' RICO claims are based upon
28 additional separate and distinct wrongful UPS actions including the following:

1 **a.** UPS's undisclosed predetermination that packages shipped
2 between specific zip codes will never receive "air" level of service.

3 **b.** Withholding the facts, fully known to UPS, that many packages
4 shipped by an Air service will be handled in precisely the same way and delivered
5 at the same time whether the customer pays for Air service or buys far less
6 expensive Ground service. Instead of revealing these facts, UPS only tells
7 customers that Ground packages will be delivered by the end of the day, when it
8 often knows with certainty that they will be delivered at the same time as more
9 expensive Air packages. UPS makes these omissions and misrepresentations to
10 trick customers into paying for Air services they do not need and will never receive.

11 **c.** Misrepresentations on the UPS website screens that only "air"
12 level of service is available for delivery of letters.

13 **d.** The misrepresentation in "tracking" reports that UPS has
14 provided the selected "air" level of service.

15 **e.** The misrepresentation in UPS "proof of delivery" reports that
16 UPS has provided the selected "air" level of service.

17 **f.** The misrepresentation in the Invoices which bill the shipper for
18 "air" service not provided.

19 **g.** It is impossible for a shipper to determine whether any
20 individual shipment has been changed from the "air" level of service to ground
21 service.

22 **h.** It is impossible to determine that UPS has assessed surcharges
23 for aviation fuel for ground shipments.

24 **i.** The Subsequent Shipping Documents are intended by UPS to
25 "lull" and deceive shippers.

26 **56.** UPS uses deception and false advertising to induce Plaintiffs and Class
27 members to purchase the more expensive air services and to convince Plaintiffs and
28 Class members they have actually received some benefit in exchange for the

1 premiums paid. This premium cannot be in exchange for a better delivery
2 guarantee, because in many instances, the delivery guarantees for air services are
3 identical to those for ground service or ground packages will actually arrive at the
4 desired earlier time.

5 **57.** Rather than disclosing to Plaintiffs and Class members that they are
6 paying for an air service premium that carries no benefit – i.e., that although they
7 are paying as much as three or four times the Ground service rate, they are
8 receiving Ground service and nothing else – UPS accepts the Plaintiffs' and Class
9 members' packages and payment and silently pockets the extra profit.

10 **58.** Regardless of whether the UPS Website Terms permit UPS to change
11 the mode of transportation for certain Class members' packages, UPS's false
12 representations – made to deceive Plaintiffs and Class members into believing they
13 receive some benefit for the air service premiums paid – violate established public
14 policy and are immoral, unethical, oppressive, unscrupulous and substantially
15 injurious to consumers.

16 **59.** UPS's transmission of these false representations through the U.S.
17 Mails and wires constitutes mail and wire fraud, predicate acts under RICO.

18 **A. Pattern of Racketeering Activity.**

19 **60.** UPS and/or Defendants DOES have wrongfully participated in the
20 conduct of an association-in-fact enterprise through a pattern of racketeering
21 activity which has directly injured Plaintiffs and the Class in their business and
22 property in violation of 18 U.S.C. § 1962(c). UPS sets both the prices and the
23 terms and conditions of sale for air shipping services, as well as manages the
24 conduct of the affiliates in the shipping network, including the Retail Franchises,
25 UPS Alliance Locations, UPS Partners, and the Additional Shipping Outlets, in
26 other ways.

27 **61.** The pattern of racketeering activity has been ongoing on a regular and
28 continuous basis for more than ten years, and will continue into the future.

1 **62.** “Air-In-Ground” is UPS’s program of substituting ground service for
2 Plaintiffs’ and Class members’ air service packages while billing Plaintiffs and
3 Class members for air transportation. The purpose of the Air-In-Ground program is
4 to collect the higher price charged for air transportation while actually transporting
5 packages more cheaply by ground.

6 **63.** Despite UPS’s agreement to provide air shipping services for a fee,
7 UPS deliberately substitutes far less expensive ground shipping services and
8 conceals the same from Plaintiffs and Class members who paid for air shipping. By
9 selling air transportation to customers and then shipping Plaintiffs’ and Class
10 members’ packages by ground transportation, UPS has been able to fraudulently
11 and dramatically increase its profits.

12 **B. Association-In-Fact Enterprise.**

13 **64.** An association-in-fact enterprise exists that includes Defendant UPS,
14 the Retail Franchises, UPS Alliance Locations, UPS Partners, the Additional
15 Shipping Outlets, and Defendants DOES. The association-in-fact alleged herein
16 constitutes an “enterprise” within the meaning of 18 U.S.C. § 1961(4).

17 **65.** The association-in-fact enterprise is a group of separate and distinct
18 entities associated together for the common purpose of shipping packages in the
19 United States through the UPS shipping network. Many other entities, including
20 affiliates of UPS and other third party entities, are also part of the UPS shipping
21 network. The enterprise is engaged in, and its activities affect, interstate commerce.

22 **66.** This association-in-fact enterprise constitutes an ongoing organization
23 based upon the continuing contractual and other business relationships between
24 UPS, the UPS Retail Franchises (such as UPS Stores and Mail Boxes, Etc., Inc.),
25 UPS Alliance Locations (such as Office Depot, Inc. and Staples, Inc.), UPS
26 Partners (such as Unishippers), and the Additional Shipping Outlets (such as UPS
27 outlets in convenience stores). The association-in-fact enterprise has a structure
28 separate and distinct from the pattern of racketeering activity.

1 **67.** UPS and/or Defendants DOES have conducted the affairs of the
2 association-in-fact enterprise through a pattern of racketeering activity as defined in
3 18 U.S.C. §§ 1961(1) and (5). As stated, UPS sets both the prices and the terms and
4 conditions of sale for air shipping services. For instance, UPS dictates the rates for
5 2nd Day Air and Next Day Air services, as well as the fuel surcharges for air and
6 ground services. On information and belief, UPS also manages the conduct of the
7 affiliates in the shipping network by training affiliates' employees on the use of the
8 UPS package tracking system and payment system and on UPS policies regarding
9 package shipments; maintaining and updating the package tracking system used by
10 affiliates; maintaining and updating the payment system used by affiliates; and
11 coordinating with affiliate employees regarding package pick-up. Further, UPS
12 establishes the rules and guidelines regarding the eligibility of packages received by
13 the affiliates for given levels of service.

14 **C. Predicate Acts of Mail and/or Wire Fraud.**

15 **68.** UPS and/or Defendants DOES participated in and/or controlled the
16 association-in-fact enterprise through a pattern of racketeering activity in violation
17 of 18 U.S.C. § 1962(c). Acts of mail fraud and/or wire fraud are committed each
18 time Defendant UPS sends Plaintiffs and the Class an Invoice for payment of
19 charges for air shipments and surcharges for aviation fuel on shipments for which
20 UPS substitutes ground service. Acts of wire fraud are also committed each time
21 UPS uses the internet (for instance UPS's website or email) to communicate
22 misrepresentations to Plaintiffs and the Class, that UPS will provide an "air" level
23 of service, that "air" level of service is necessary to obtain necessary delivery times,
24 that only "air" level of service is available for letters, that UPS has actually
25 provided "air" level of service, and the other misrepresentations, half-truths, and
26 concealment of material facts alleged herein. These acts are indictable under 18
27 U.S.C. § 1341 (mail fraud) and/or 18 U.S.C. § 1343 (wire fraud). UPS and/or
28 Defendants DOES has committed these predicate acts of mail fraud and/or wire

1 fraud with a specific intent to defraud and in furtherance of the scheme to defraud
2 (the Air-In-Ground Program) frequently and continuously for more than ten years.
3 Specific incidents of mail and/or wire fraud, including the dates and amounts of
4 fraudulent billings, are set forth in Appendix A.

5 **69.** UPS transmitted the fraudulent Invoices for air shipments wrongfully
6 changed from the selected “air” level of service to ground service to Plaintiffs and
7 to the Class on hundreds of thousands of occasions through the U.S. Mails and/or
8 transmission via wire facilities (*i.e.*, by facsimile or electronically) in violation of
9 18 U.S.C. §§ 1341 and 1343.

10 **70.** UPS and/or Defendants DOES have also fraudulently used the U.S.
11 Mails and wires in violation of 18 U.S.C. §§ 1341 and 1343 to facilitate the Air-In-
12 Ground program in the following additional ways: (a) for oral and written
13 communications between customers and UPS; (b) for internal oral and written
14 communications between UPS officers and employees; (c) for oral and written
15 communications with Retail Franchises, UPS Alliance Locations, UPS Partners,
16 and Additional Shipping Outlets; and (d) to receive payment from Plaintiffs and the
17 Class for the wrongful and fraudulent UPS charges. The specific number of
18 predicate acts cannot be alleged fully without access to UPS’s books and records
19 but is estimated to be hundreds of thousands of occurrences.

20 **71.** UPS’s wire fraud and mail fraud has been in furtherance of the UPS
21 scheme or artifice to defraud or obtain money by means of false or fraudulent
22 pretenses concerning the practice of substituting ground service for air packages
23 and charging the customer for air shipment (the Air-In-Ground program).

24 **72.** UPS and/or Defendants DOES have utilized said wire fraud and mail
25 fraud to conduct an ongoing pattern of racketeering. The racketeering acts are
26 directly related to each other and have a common purpose. The wrongful conduct
27 of changing air packages from the selected “air” level of service to ground service
28 and charging the customer for “air” level of service (the Air-In-Ground program)

1 has been ongoing and continuous since 1995 and will continue in the future, absent
2 relief in this action.

3 **73.** UPS could not have carried out its Air-In-Ground program without
4 conducting the same fraudulent activities through all branches of its shipping
5 network (the association-in-fact enterprise). Had UPS not implemented the Air-In-
6 Ground program for all shipments, regardless of how they were commissioned, the
7 fraud it was perpetrating would have come to light. Therefore, UPS's fraud through
8 the association-in-fact enterprise was a necessary part of the Air-In-Ground
9 program as a whole.

10 **V. UPS BREACHED ITS CONTRACTS WITH PLAINTIFFS AND THE
11 CLASS MEMBERS**

12 **A. How Plaintiffs and Class Members Ship Their UPS
13 Packages.**

14 **74.** The shipping documents that Plaintiffs and Class members see and
15 rely upon when contracting with UPS clearly indicate, through the very names of
16 each of the services UPS sells, that the shipment will be by "air." UPS offers to
17 their customers a variety of services, including Next Day Air Early A.M., Next Day
18 Air, Next Day Air Saver, 2nd Day Air A.M., 2nd Day Air, 3 Day Select, and
19 Ground. Exhibit 1 is an example of the UPS shipping form for Next Day Air
20 (hereinafter "Shipping Document") (*see also* Exhibit 2, an example of the UPS
21 shipping form for 2nd Day Air).

22
23
24
25
26
27
28

 UPS Next Day Air® UPS Worldwide Express™ Shipping Document <small>See instructions on back. Visit UPS.com® or call 1-800-PICK-UPS® (800-742-5877) for additional information and Terms and Conditions.</small>		1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 183904		
TRACKING NUMBER J201 180 6921		WEIGHT Enter "LTR" if Letter DIMENSIONAL WEIGHT If Applicable LARGE AIR PACKAGE <input type="checkbox"/> 5 <input type="checkbox"/> NEXT DAY AIR <input type="checkbox"/> EXPRESS (INT'L) CHARGES \$ <small>FOR WORLDWIDE EXPRESS SHIPMENTS</small> <small>Mark an "X" in this box if shipment only contains documents of no commercial value.</small> <input type="checkbox"/> DOCUMENTS ONLY 6 <input type="checkbox"/> SATURDAY PICKUP <small>See Instructions.</small> <input type="checkbox"/> SATURDAY DELIVERY <small>See Instructions.</small> AMOUNT \$ DECLARED VALUE FOR CARRIAGE <small>Check this box if value is \$100. For declared values over \$100, see Instructions.</small> <input type="checkbox"/> AMOUNT \$ C.O.D. <small>If C.O.D., enter amount to be collected and attach completed UPS C.O.D. tag to package.</small> <input type="checkbox"/> AMOUNT \$ <small>An Additional Handling Charge applies for certain items. See Instructions.</small> <input type="checkbox"/> AMOUNT \$ TOTAL CHARGES \$ 7 <input type="checkbox"/> ADDITIONAL HANDLING CHARGE 8 <input type="checkbox"/> METHOD OF PAYMENT <small>In Section 1</small> <input type="checkbox"/> BILL SHIPPER'S ACCOUNT NUMBER <input type="checkbox"/> BILL RECEIVER'S DOMESTIC PARTY <input type="checkbox"/> BILL THIRD PARTY <input type="checkbox"/> CREDIT CARD <small>American Express Diner's Club MasterCard Visa</small> <small>RECORD ACCOUNT NO. IN SECTION 9</small> <input type="checkbox"/> CHECK 9 RECEIVER'S/THIRD PARTY'S UPS ACCT. NO. OR MAJOR CREDIT CARD NO. <input type="checkbox"/> EXPIRATION DATE / / <small>THIRD PARTY'S COMPANY NAME</small> <small>STREET ADDRESS</small> <small>CITY AND STATE</small> <input type="checkbox"/> ZIP CODE <small>The shipper certifies UPS to act as forwarding agent for export control and customs purposes. The shipper certifies that these commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Overseas country to U.S. law is prohibited.</small>		
1 SHIPMENT FROM <small>SHIPPER'S UPS ACCOUNT NO.</small> <input type="checkbox"/> <small>REFERENCE NUMBER</small> <input type="checkbox"/>		10 SHIPPER'S SIGNATURE <input type="checkbox"/> DATE OF SHIPMENT / / <small>All shipments are subject to the terms contained in the UPS Tariff and Terms and Conditions of Service, which are available at UPS.com and local UPS offices.</small> <small>010191116 1/06 MW</small> UPS COPY		
				

Exhibit 1

75. Plaintiffs and the Class reasonably believed their packages would be shipped by air because the plain and ordinary meaning of Next Day Air service is “shipment by air, delivered by the following day” and the plain and ordinary meaning of 2nd Day Air service is “shipment by air, delivered within two days.” By contrast, the plain and ordinary meaning of Ground service is “ground shipment,” which is not what Plaintiffs and the Class purchased and not what they expected to receive. Nothing on the Shipping Document the customer completes to purchase UPS services indicates that UPS is not agreeing to deliver according to the plain English meaning of the service the shipper selects.

76. Because the purchased services specify “air,” they are also not at all ambiguous as to how delivery would be accomplished, in the way that a service such as 3 Day Select is. If UPS had intended to make no representation as to how

1 shipment would be handled, it could have simply called its services “Next Day
2 Shipping” and “2nd Day Shipping.” On information and belief, UPS opted not to
3 do this because it (accurately) believed that Plaintiffs and Class members would
4 believe they were getting air service if “Air” was in the name of the service and,
5 consequently, would be more willing to pay a premium price.

6 **77.** To select Next Day Air service, the shipper simply fills out the Next
7 Day Air shipping form (*See* Exh. 1), or selects Next Day Air shipping online or at a
8 shipping outlet. Whatever manner of selecting the service the customer uses, the
9 Shipping Document, as well as UPS’s Website Terms and Guide, indicate that “the
10 service selected by the shipper” (and not some other service) will be delivered.

11 **78.** UPS charges a steep premium for air shipping services that it does not
12 provide and never had any intention of providing. The Class typically pays UPS
13 two to three times more to ship with UPS by air than to ship with UPS by ground.
14 In 2008, UPS’s average revenue per piece for Next Day Air was \$21.95. Whereas
15 in 2008, UPS’s average revenue per piece for Ground was \$7.42. Thus, when an air
16 package is instead sent by ground shipping (“grounded out” in UPS internal
17 parlance), UPS simply pockets the substantial difference in price between the
18 service it charges for and the service it actually delivers.

19 **79.** UPS may claim that its customers only care about whether their
20 packages arrive on time, and, therefore, customers are unharmed when ground
21 services are substituted for air services. But UPS ignores the undeniable fact that
22 Plaintiffs and Class members also care about *price*. It is axiomatic that no shipper
23 wants to, or would ever knowingly agree to, pay two or three times more to get the
24 same service under a different name.

25 **80.** Though UPS, in some (but not all) contexts, places a trademark sign
26 next to each service name, UPS nowhere indicates to Plaintiffs and Class members
27 that the names of UPS’s services do not accurately describe the services, and
28 nowhere does UPS define the products it sells as meaning anything other than the

1 plain and ordinary meaning of the words.

2 **B. UPS Does Not Sell a Mere Time of Delivery Promise.**

3 **(1) Plaintiffs and Class Members Were Entitled to Receive**
4 **the Service They Purchased.**

5 81. Plaintiffs and Class members buy a level of service that expressly
6 includes the method of shipping in the name of the service itself. The name of the
7 service is, therefore, also a description of what exactly Plaintiffs and Class
8 members are buying and why they should choose this service over the other
9 options. UPS's agreement to provide its 2nd Day Air service, for example, was
10 understood by Plaintiffs and the Class to be an agreement to ship packages by air
11 for delivery within the next two days. UPS cannot claim to be selling *only* a time of
12 delivery promise, because it did not sell to Plaintiffs and Class members only "2nd
13 Day Shipping."

14 82. UPS cannot substitute a different service, that it offers at a lower price,
15 and claim to have performed the contract Plaintiffs and Class members agreed to.
16 Therefore, in every case where Plaintiffs and Class members purchased an "Air,"
17 but only received "Ground," UPS has fundamentally breached its contract with the
18 shipper.

19 **(2) UPS Cannot Claim Plaintiffs and Class Members**
20 **Knowingly Paid More For An Earlier Time of Delivery**
21 **Promise, Because The Time of Delivery Promise Was Often**
22 **Identical.**

23 83. For many Plaintiffs and Class members, the air shipping premium that
24 UPS charges cannot be attributed to any earlier time-of-delivery guarantee because
25 there is no earlier time of delivery guarantee given for the air services as opposed to
26 the much less expensive ground service.

27 84. For instance, for many Class members that paid for "Next Day Air
28 Saver" and for all Class members that paid for "2nd Day Air," in the cases in which

1 their packages were shipped by ground, they would have received *exactly the same*
2 *delivery guarantee and package handling* whether they paid a premium for non-
3 existent air services or bought Ground service from the outset.

4 **85.** Exhibits 36 and 37 are examples of UPS Time and Cost summaries for
5 shipment from San Francisco to Los Angeles and from San Francisco to San Jose,
6 respectively.

7 **86.** Exhibit 36 shows that, for a package sent from San Francisco to Los
8 Angeles, UPS's delivery guarantee is *exactly the same* for 2nd Day Air and Ground
9 services, while the price for the air service is more than twice as high. Below is an
10 excerpt of Exhibit 36.

11	UPS 2nd Day Air®	5:00 P.M. Tuesday October 19, 2010	By End of Day, Thursday October 21, 2010	27.70 USD*
12	Days In Transit: 2	Schedule by 4:30 P.M. Tuesday October 19, 2010		Billable Weight: 10.0 lbs.
13	UPS Ground	5:00 P.M. Tuesday October 19, 2010	By End of Day, Thursday October 21, 2010	11.28 USD*
14	Days In Transit: 2	Schedule by 4:30 P.M. Tuesday October 19, 2010		Billable Weight: 10.0 lbs.
15				
16				
17				
18				

19 **87.** Similarly, Exhibit 37 shows that, for a package sent from San
20 Francisco to a residential address in San Jose, UPS's delivery guarantee is exactly
21 the same for Next Day Air Saver and Ground services, while the price for the air
22 service is nearly three times as high. Below is an excerpt of Exhibit 37.

23	UPS Next Day Air Saver®	5:00 P.M. Tuesday October 19, 2010	By End of Day, Wednesday October 20, 2010	33.59 USD*
24	Days In Transit: 1	Schedule by 4:30 P.M. Tuesday October 19, 2010		Billable Weight: 10.0 lbs.
25	UPS Ground	5:00 P.M. Tuesday October 19, 2010	By End of Day, Wednesday October 20, 2010	12.22 USD*
26	Days In Transit: 1	Schedule by 4:30 P.M. Tuesday October 19, 2010		Billable Weight: 10.0 lbs.
27				
28				

88. Plaintiffs and Class members, seeing that air services cost two or three times as much as Ground service for exactly the same delivery guarantee, reasonably believed that the premium they pay for air service must be in exchange for actual delivery by air. Customers choosing to pay more for air service, rather than purchasing ground service with the same guarantee, might reasonably believe that air service is associated with better package handling, that air is safer than surface transportation, or that any number of benefits might accrue to air service over ground service.

89. But no matter what the Plaintiffs' and Class members' reasons for choosing to pay a premium for air, it is undeniable that Plaintiffs and Class members do not think they are paying the premium for a better time of delivery promise, because the time of delivery promise is exactly the same. The only difference between the cheaper and more expensive option is the clear indication that the more expensive option will be a different service. In truth, however, because of the Air-In-Ground program, there is no different service. The package shipped by 2nd Day Air from San Francisco to Los Angeles is delivered at the same time and in exactly the same manner *by Ground*, whether the Class member pays extra money for the false promise of "air" or not.

(3) Other Class Members Were Misled Into Believing Air Services Were Necessary To Get An Earlier Time of Delivery,
When UPS Knew In Advance That They Were Not Necessary.

90. In addition to the group of Class members described above, who get the same time of delivery guarantee, other Class members who sought and paid for a time of delivery before the end of the day were given *different* time of delivery guarantees for Air services than for Ground services, even though UPS knew that their packages would be handled in the same way and arrive at the same time regardless of what the Customer bought.

1 **91.** UPS intentionally withholds from Plaintiffs and Class members the
2 true facts that it knows about its Ground shipping service. On information and
3 belief, for many destinations around the country, UPS knows that Ground packages
4 sent from nearby locations will be handled *in exactly the same way* and *arrive at*
5 *exactly the same time* as Next Day Air or Next Day Air Saver packages. Despite
6 UPS's knowledge of these facts, the UPS website and Guide misleadingly suggest
7 that Plaintiffs and Class members have to purchase the far more expensive Air
8 services to ensure that packages will be delivered before the end of the day (for
9 example, at 10:30 A.M. for Next Day Air). This induces Plaintiffs and Class
10 members to buy the more expensive services, when Plaintiffs and Class members
11 would otherwise select Ground if they had all the facts. Of course, because of the
12 Air-In-Ground program, UPS knows that all such Class members will get Ground,
13 whether they pay about three times as much for Air or not.

14 **92.** UPS withholds this vital information from Plaintiffs and Class
15 members for the express purpose of fraudulently inducing them into buying
16 unnecessary “Air” services, despite UPS’s foreknowledge that it will deliver
17 “Ground” service, and its knowledge that the package will arrive at the very same
18 time whether the customer pays for Ground or pays three times as much for Next
19 Day Air.

22 **93.** No Class member would willingly pay two or three times as much for
23 an Air service knowing that UPS intends to provide exactly the same service he
24 would get by purchasing Ground. Consequently, such a Class member is duped
25 into buying Air by the falsehood of two levels of service being offered at all. UPS
26 knows that, despite what it offers for sale, only Ground service is actually available
27 to a customer shipping between two of these pre-determined locations. The Class
28 member is literally paying a premium for nothing.

1 **94.** Again, as only one example, as a result of its Air-In-Ground scheme,
2 UPS knows, in advance of making the sale, that the package of the Class member
3 who purchases 2nd Day Air from San Francisco to Los Angeles will receive exactly
4 the same treatment – including the same delivery guarantee – as the Class member
5 who purchases Ground. Nonetheless, it fraudulently sells these non-existent air
6 services and collects the hefty premiums associated with services that it knows will
7 never be rendered and which are not even available between those two locations.

8 **95.** UPS was careful to hide the truth from Plaintiffs and Class members
9 and never disclosed that it is selling two identical products for two very different
10 prices. UPS's reasons for perpetrating this fraud are obvious. If Class members
11 knew the facts, no rational shipper would ever pay for Air services when Ground
12 shipping would produce the same results. But, as a result of UPS's deception,
13 every day tens of thousands of Class members continue to pay an unjustifiable
14 premium for air service, and continue to receive ground service.

15 **C. The UPS Website Terms.**

16 **96.** Some, but not all, UPS Shipping Documents reference UPS's Website
17 Terms. Though UPS refers to its Website Terms as a tariff, that document is not a
18 legally filed tariff. Rather, the UPS Website Terms are a contract of adhesion (to
19 the extent they form part of the contract at all), drafted and imposed by UPS.

20 **97.** The UPS Website Terms are available only through UPS's website.
21 To review the Website Terms, a customer must navigate to the UPS website
22 (www.ups.com) and then locate and click on a link to the UPS Website Terms. For
23 instance, scrolling down to the very bottom of the webpage brings into view a list
24 of links, under the heading "Other," that includes "UPS Tariff/Terms and
25 Conditions of Service" between "Trademarks" and "UPS London 2012
26 Sponsorship." Clicking that link opens a pop-up window, which in turn contains a
27 link for downloading the UPS Website Terms. Clicking on the "Download" link
28 causes the UPS Website Terms to download and open as an Adobe .pdf file.

1 **98.** The Website Terms in no way disclose or authorize UPS's Air-In-
2 Ground scheme. Instead of informing Plaintiffs and Class members that UPS has
3 no air service between certain locations, the Website Terms only state, confusingly,
4 that UPS reserves the right to use "any mode of transportation" to provide "the
5 service selected by the shipper." In particular, on page 26 of the 40-page .pdf,
6 Section 36, entitled "UPS Rates," (which UPS referred to as the "Shipping Mode
7 Clause") of the September 21, 2010 UPS Website Terms provides:

8 UPS reserves the right in its sole discretion to use any mode of
9 transportation whatsoever to provide the service selected by the
10 shipper. Regardless of the mode of transportation used, the effective
11 UPS Rates for the service selected by the shipper shall apply. If,
12 however, a shipper selects a UPS service to a destination for which
only a higher level of service is available, UPS will substitute the next
higher level of available service and will charge the corresponding rate
for the substituted service.

13 (**Section 36**).

14 **99.** UPS Website Terms prior to 2002 did not contain this provision,
15 although UPS implemented the Air-In-Ground program in 1995. For instance, the
16 September 24, 2001 UPS Website Terms, excerpt attached hereto as Exhibit 38,
17 contained no provision like the one above. Therefore, this provision is plainly not
18 part of the contract between UPS and Plaintiffs (or any Class members) as to
19 packages shipped before 2002.

20 **100.** Plaintiff Owens established its UPS account on February 5, 2001.
21 Plaintiffs Designer and Pocino established their accounts with UPS in or before
22 2000. Plaintiffs Owens, Designer and Pocino do not currently maintain invoices
23 and other records relating to UPS shipments before January 7, 2002. However,
24 Plaintiffs Owens, Pocino, and Designer allege, on information and belief, that they
paid for many UPS shipments subject to the Air-In-Ground program prior to
25 January 7, 2002. UPS is liable for wrongful charges to these Plaintiffs for such
26 shipments for the reason alleged herein. These Plaintiffs require discovery from
27
28

1 UPS to more specifically allege such additional shipping transactions.

2 **101.** Additionally, Class members who access UPS shipping services
3 through methods such as through a UPS Store or UPS Retail Outlet do not have
4 access to the Website Terms at the time of shipment. Therefore, the UPS Website
5 Terms are also not adequately incorporated by reference into the shipping contracts
6 between UPS and the In-Store Shipper subclass.

7 **102.** But even for those shippers for whom Section 36 is even arguably part
8 of the contract with UPS, it does not excuse the Air-In-Ground scheme. In Section
9 36, UPS clearly states that it will “provide the service selected by the shipper.” For
10 example, if the customer selects Next Day Air service, UPS must provide Next Day
11 Air service, not 2nd Day Air service, 3 Day Select service, or Ground service.
12 Plaintiffs and Class members reasonably believe that when the shipper selects Next
13 Day Air, UPS must provide air shipment within the next day. If UPS, in fact, ships
14 the package by ground, it has provided Ground service instead of the “service
15 selected by the shipper” and has, therefore, breached its contract with the shipper.
16 Section 36 plainly *does not* permit UPS to substitute a different service for the one
17 the shipper selects.

18 **103.** A reasonable customer reviewing UPS’s reservation of the right to
19 provide “any mode of transportation whatsoever to provide the service selected by
20 the shipper” would likely be confused. On the one hand, UPS, by this very clause
21 must “provide the service selected by the shipper.” On the other hand, UPS states
22 that it may “use any mode of transportation” to provide this air shipment. Not
23 knowing what shipment methods UPS uses, a reasonable customer might
24 understand this clause to mean that UPS could use its own cargo plane to deliver
25 the shipment, or might ship the package on another type of plane. Similarly, the
26 reasonable customer could infer that this clause only means that UPS reserves the
27 right to determine in its judgment whether to send Ground packages by train, truck
28 or some other form of ground transportation.

1 **104.** A reasonable customer might also understand the clause to apply only
2 to those levels of service sold by UPS, of which there are several, that are not
3 expressly designated as either air or ground shipping. Under this clause, in the case
4 of UPS 3 Day Select service, UPS could use a truck, train, plane or ship to transport
5 the package, while still providing the service selected, as long as the package was
6 delivered within three days. A customer could reasonably believe this provision
7 applies to those services where the method of delivery is unspecified, and no others.

8 **105.** But a reasonable customer clearly would not believe, and Plaintiffs
9 themselves never thought, that UPS would sell Next Day Air or 2nd Day Air
10 service, guarantee that such a service will be provided, but then put the package on
11 a truck, thereby rendering a different service. As discussed in the next section, a
12 reasonable customer also would not believe UPS would add a surcharge for
13 aviation fuel, when, as is the reality, UPS knows in advance of the sale that it will
14 ship the package by ground. Plaintiffs and Class members reasonably expect that
15 when they pay a premium for a service, they are actually receiving some premium
16 service in return.

17 **D. UPS's Rate and Service Guide.**

18 **106.** UPS explicitly alleges that the Guide is part of the shipping contract
19 between UPS and the shipper. UPS Memorandum at 4-7 (Doc. 20). UPS alleges
20 that: "As detailed in the Guide, UPS offers a spectrum of domestic shipping
21 services, from same day delivery to delivery within five days ("UPS Ground")."
22 The Guides attached to the Rogers affidavit (Doc. 22) each contain a minimum of
23 22 pages describing the various levels of service (and related prices) in great detail.

24 **107.** The price that UPS customers, including Plaintiffs and Class members,
25 pay for an individual shipping transaction depends upon the level of service
26 selected by the shipper and the information in the Guide. The Guide describes the
27 several different levels of available "Air" service. Each specifies a time of delivery
28 depending upon the zip codes of the points of origin and destination.

1 **108.** UPS specifically advises its customers to review the various levels of
2 service in the Guide and “from this array of services... determine the service that
3 best meets your needs.” The Guide falsely represents that a Next Day Air level of
4 service is necessary to obtain delivery before the end of the next business day. In
5 fact, many packages originally sent by ground will arrive at the same time.

6 **109.** These levels of service are not mere “labels” or “headings” but
7 explicitly describe the services from which the shipper should select the service that
8 best meets the shipper’s needs. UPS utilizes the Guide precisely to induce shippers
9 to unnecessarily pay the much higher price for “air” level of service to achieve a
10 desired delivery time.

11 **110.** The information in the Guide about levels of service is inconsistent
12 with the UPS predetermination that it will never provide the “air” level of service
13 for the shipments in issue.

14 **111.** UPS cannot hide from its admission that the levels of “air” service are
15 an integral part of its contractual commitment. Nor can UPS credibly contend that
16 Plaintiffs and Class members care nothing about price but rather only about
17 delivery times. That proposition crumbles in the face of the reality that Plaintiffs
18 and Class members are not paying prices necessary to obtain desired delivery times.
19 Indeed, in many cases the delivery times offered to Plaintiffs and Class members
20 for Ground and Air service are exactly the same. Also, through misrepresentation
21 in its Guide and website, UPS has an elaborate scheme and artifice to induce other
22 Class members to pay unnecessary prices for unnecessary levels of “air” service
23 and to cheat Plaintiffs and Class members into paying much higher surcharges for
24 aviation fuel for ground delivery.

25 **VI. JURISDICTION AND VENUE**

26 **112.** This action asserts claims for violations of the Racketeer Influenced
27 and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, *et seq.*, for breach of
28 contract, for fraudulent inducement, for breach of the implied covenant of good

1 faith and fair dealing, and for unjust enrichment. Pursuant to 28 U.S.C. § 1332, as
2 amended by the Class Action Fairness Act of 2005, this Court has subject matter
3 jurisdiction over this nationwide class action because the matter in controversy
4 exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which a
5 member of the Class of plaintiffs is a citizen of a state different from UPS. *See* 28
6 U.S.C. § 1332(d)(2)(A). This Court has subject matter jurisdiction over Counts I-V
7 of this Complaint pursuant to 28 U.S.C. § 1331 and 18 U.S.C. §§ 1964(a) and (c) as
8 a federal question arising under RICO. This Court has subject matter jurisdiction
9 over Counts VI-XIII of this Complaint pursuant to 28 U.S.C. § 1367.

10 **113.** This Court has personal jurisdiction over UPS under applicable long-
11 arm statutes. UPS is a person within the context of those statutes that directly or
12 through its agents conducts substantial, continuous, and systematic economic
13 activities in California. Venue is proper in this district pursuant to 28 U.S.C. §
14 1391, because a substantial part of the events or omissions giving rise to Plaintiffs'
15 claims occurred in this district, UPS has agents and transacts substantial business in
16 this district, and many members of the Class reside or do business in this district.

17 **VII. THE PARTIES**

18 **114. Plaintiff Pocino Foods Company** ("Pocino") is incorporated under
19 the laws of the state of California and has a principal place of business in City of
20 Industry, California. Pocino is a citizen of California. Pocino is a family-owned
21 food production company.

22 **115. Plaintiff Designer Imports, International, Inc.** ("Designer Imports")
23 is a corporation incorporated under the laws of the state of California and has a
24 principal place of business in Los Angeles, California. Designer Imports is a
25 citizen of California. Designer Imports is engaged in the manufacture of furniture
26 for hotels and other commercial users.

27 **116. Plaintiff Arapahoe Hyundai, LLC** ("Arapahoe Hyundai") is a
28 limited liability company organized under the laws of the state of Colorado with its

1 principal place of business in Centennial, Colorado. Arapahoe Hyundai is a citizen
2 of Colorado. Arapahoe Hyundai is a full-service car dealership. Arapahoe
3 Hyundai regularly ships auto parts to other dealerships and to collision repair
4 centers.

5 **117. Plaintiff Owens Financial Group, Inc.** (“Owens”) is a corporation
6 incorporated under the laws of the state of Georgia and has a principal place of
7 business in Rome, Georgia. Owens is a citizen of Georgia. Owens is engaged in
8 the business of providing financial consulting services. Owens regularly ships
9 letters to its clients by UPS. In addition, Owens regularly receives letters from its
10 clients shipped by UPS and billed to Owens’s UPS account.

11 **118. Defendant United Parcel Service, Inc.** is a corporation incorporated
12 under the laws of the state of Delaware with its principal place of business at 55
13 Glenlake Parkway, N.E., Atlanta, Georgia 30328. The registered agent is
14 Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington,
15 Delaware 19808.

16 **119. Defendant United Parcel Service, Inc.** is a corporation incorporated
17 under the laws of the state of Ohio with its principal place of business at 55
18 Glenlake Parkway, N.E., Atlanta, Georgia 30328. The registered agent is
19 Corporation Service Company d/b/a CSC-Lawyers Incorporating Service, 2730
20 Gateway Oaks Drive, Suite 100, Sacramento, California 95833.

21 **120. Defendant United Parcel Service General Services Co.** is a
22 corporation incorporated under the laws of the state of Delaware with its principal
23 place of business at 55 Glenlake Parkway, N.E., Atlanta, Georgia 30328. The
24 registered agent is Corporation Service Company d/b/a CSC-Lawyers Incorporating
25 Service, 2730 Gateway Oaks Drive, Suite 100, Sacramento, California 95833.

26 **121. Defendant United Parcel Service Co. d/b/a United Parcel Service
27 Co. (Air)** is a corporation incorporated under the laws of the state of Delaware with
28 its principal place of business at 55 Glenlake Parkway, N.E., Atlanta, Georgia

1 30328. The registered agent is Corporation Service Company d/b/a CSC-Lawyers
2 Incorporating Service, 2730 Gateway Oaks Drive, Suite 100, Sacramento,
3 California 95833.

4 **122.** In 1907, Jim Casey started UPS's predecessor company, American
5 Messenger Company, in Seattle, Washington. In 1919, the company adopted its
6 present name – United Parcel Service. By 1993, UPS was delivering 11.5 million
7 packages and documents per day. The huge volume of packages required UPS to
8 develop new technology. In 1992, UPS developed the handheld Delivery
9 Information Acquisition Device ("DIAD"). This device allowed electronic tracking
10 of packages. In 1995, UPS's website, UPS.com, enabled customers to track
11 shipment of their packages. UPS proudly claims that "[t]echnology is the backbone
12 of everything we do at UPS."

13 **123.** UPS holds itself out as the "largest package delivery company in the
14 world, in terms of both revenue and volume." UPS reports it serves 1.8 million
15 pick-up customers and 6.1 million delivery customers daily. In 2008, UPS
16 delivered an average of 15.5 million pieces per day worldwide, for a total of 3.92
17 billion packages that year. Total revenue in 2008 was \$51.5 billion. UPS operates
18 a ground fleet of approximately 107,000 vehicles, which reach all business and
19 residential ZIP Codes in the contiguous United States. UPS also operates a fleet of
20 approximately 570 aircraft.

21 **124.** For the year ending December 31, 2008, UPS's revenue for Next Day
22 Air was \$6,559,000,000. In 2008, UPS's average daily package volume for Next
23 Day Air was 1,186,000 packages per day. In 2008, UPS's average revenue per
24 piece for Next Day Air was \$21.95.

25 **125.** Compared to air shipment, ground shipment constitutes a materially
26 different level of service. Charges for Next Day Air and 2nd Day Air are
27 substantially more expensive than charges for ground shipment. The price to ship a
28 package between two locations by air can be two to three times the price of sending

1 the same package by ground. For the year ending December 31, 2008, UPS's
2 revenue for Ground was \$21,394,000,000. In 2008, UPS's average daily package
3 volume for Ground was 11,443,000 packages per day. In 2008, UPS's average
4 revenue per piece for Ground was \$7.42.

5 **126.** UPS's U.S. domestic package business consists of air and ground
6 shipment of small packages – up to 150 pounds in weight – and letters to and from
7 all 50 states. The domestic package business is built on an integrated air and
8 ground pick-up and delivery network. All packages – domestic or international,
9 commercial or residential, air or ground – are processed through one integrated
10 network.

11 **127.** UPS has direct pickup at customer locations, “pick up” mailbox
12 locations, and also locations known as “UPS Stores.” After shippers turn over their
13 packages, they are transported by ground to the nearest UPS Regional Service
14 Center (“**Service Center**”). The Service Centers then sort the packages for air
15 shipment or ground shipment and send them along to their next destination.

16 **128.** Prior to 2001, many of the UPS Stores were owned and operated by
17 independent third party franchisees as part of the UPS shipping network.

18 **129.** In 2001, UPS acquired Mail Boxes Etc., Inc., a major franchisor of
19 retail shipping locations. Many of these franchisee locations were then re-branded
20 as additional UPS Stores. Other locations continued to operate under the name of
21 Mail Boxes Etc., Inc. The UPS and Mail Boxes Etc., Inc. stores, totaling more than
22 4,400, are independently owned and operated by third party franchisees as part of
23 the UPS network. These locations are hereinafter referred to as the “Retail
24 Franchises.”

25 **130.** In addition to the Retail Franchises, UPS has entered into business and
26 contractual relationships with Office Depot, Inc. and Staples, Inc. to provide
27 additional UPS locations. UPS has approximately 1,200 locations in Office Depot
28 stores and 1,500 locations in Staples stores in the United States. These locations

1 are hereinafter referred to as the “UPS Alliance Locations.”

2 **131.** UPS also franchises thousands of other outlets in locations such as
3 convenience stores and grocery stores. These locations operate as additional
4 independent franchisees hereinafter referred to as the “Additional Shipping
5 Outlets.”

6 **132.** UPS also associates with entities or organizations such as Unishippers
7 Global Logistics, LLC (“Unishippers”). Unishippers describes itself as “partners
8 with carriers like UPS” to handle customers’ shipping needs. Unishippers operates
9 as an administrative and billing intermediary for customers shipping by UPS.

10 **133.** Defendant United Parcel Service, Inc., a Delaware corporation, is the
11 parent UPS corporate entity (**“Parent UPS”**). Parent UPS and its defendant
12 subsidiaries effectively conduct business collectively as one integrated unit known
13 as UPS. UPS’s business activities and operations are managed and controlled from
14 Parent UPS’s principal place of business at 55 Glenlake Parkway, N.E., Atlanta,
15 Georgia 30328. Substantially all the administrative and operational decisions are
16 made by the officers, directors, and employees located at UPS’s principal place of
17 business in Atlanta, Georgia. Parent UPS lists its principal place of business as 55
18 Glenlake Parkway, N.E., Atlanta, Georgia 30328. All four entities identified as
19 Defendants in this action have registered the same principal place of business in
20 Atlanta, Georgia. Specifically, the Air-In-Ground scheme was created and
21 implemented by Parent UPS. At all material times, Parent UPS has managed,
22 directed, controlled, and ratified all material and substantive aspects of the Air-In-
23 Ground scheme on a daily and ongoing basis. Plaintiffs allege herein multiple
24 specific examples of racketeering activities of wire and mail fraud, for which Parent
25 UPS is directly responsible and liable. Subject to Parent UPS’s direction and
26 control, the Air-In-Ground scheme represents the collective actions of the UPS
27 Defendants. The specific involvement of the subsidiary UPS Defendants in the
28 Air-In-Ground scheme is uniquely within the knowledge of the UPS organization.

1 Plaintiffs allege in detail the specific circumstances constituting the overall
2 fraudulent Air-In-Ground scheme.

3 **134.** The true names and capacities, whether individual, corporate,
4 associate, or otherwise, of **Defendants DOES 1 through 10**, inclusive, are
5 unknown to Plaintiffs, who therefore sue said defendants by such fictitious names
6 pursuant to California Code of Civil Procedure § 474. Plaintiffs are informed and
7 believe, and based thereon allege, that each such “DOE” defendant is responsible in
8 some manner for the events and transactions alleged herein. Plaintiffs will amend
9 this complaint to state the true names and capacities of said defendants when the
10 same has been ascertained.

11 **135.** Plaintiffs are informed and believe, and based thereon allege, that each
12 of the Defendants DOES is now and has been at all times herein mentioned, the
13 agent, servant, employee, partner, associate, joint venturer, co-participant and/or
14 principal of or with each of the remaining defendants, and that each of the
15 Defendants DOES has been, at all times mentioned herein, acting within the scope
16 of such relationship and with the full knowledge, consent, authority, ratification,
17 and/or permission of each of the remaining defendants.

18 **136.** Plaintiffs are informed and believe, and based thereon allege, that each
19 of the Defendants DOES took part in devising the Air-In-Ground program; took
20 steps to sustain the Air-In-Ground program, including but not limited to restricting
21 the dissemination of information about the program; ensured that the Air-In-Ground
22 program was enforced; and/or were otherwise complicit in the creation or execution
23 of the Air-In-Ground program.

24 **VIII. CLASS ALLEGATIONS**

25 **137.** Pursuant to F.R.C.P. 23(a) and 23(b)(3), Plaintiffs bring this action on
26 behalf of themselves and a class of all shippers who paid UPS for an air shipment
27 that UPS redirected to ground transportation under its Air-In-Ground program (the
28 “Class”). The Class consists of all persons and entities within the United States (i)

1 who paid charges directly to UPS or paid a third party for an air shipment
2 (including, in some cases, a surcharge for aviation fuel); (ii) for a package for
3 which UPS substituted ground shipment for air shipment through the Air-In-
4 Ground program, and (iii) who did not pass those charges on for payment by their
5 customers or other third parties.

6 **138.** Within the Class are three subclasses: the “**Direct Shipper**” subclass;
7 the “**Indirect Shipper**” subclass; and the “**In-Store Shipper**” subclass. The Direct
8 Shipper subclass consists of those members of the Class who paid charges directly
9 to UPS for an air shipment (including, in some cases, a surcharge for aviation fuel)
10 for a package for which UPS substituted ground shipment.

11 **139.** The Indirect Shipper subclass consists of those members of the Class
12 who paid charges to a third party for a UPS air shipment (including, in some cases,
13 a surcharge for aviation fuel) for a package which UPS shipped by ground. The
14 Indirect Shippers were damaged by the Air-In-Ground program through a common
15 shipping arrangement in which the Indirect Shippers received or sent UPS air
16 shipment packages through vendors or other third party entities (i.e., the Pass-
17 Through Shippers or UPS Partners), whom UPS fraudulently charged for the air
18 shipment in the first instance. The Pass-Through Shippers or UPS Partners, who
19 had no knowledge of UPS’s fraudulent Air-In-Ground program, then “passed on”
20 the fraudulent UPS charges to the Indirect Shippers. The Pass-Through Shippers
21 and UPS Partners thus resold UPS air shipping services to the Indirect Shippers
22 who paid the fraudulent UPS charges. For example, when a customer orders
23 products by air shipment from an online vendor such as Peet’s Coffee & Tea, Inc.,
24 New Balance Athletic Shoe, Inc., Sephora USA, Inc., and Textbooks.com, the
25 online vendor has a contract with UPS that governs the shipment, but the vendor
26 passes on the UPS charges by including the shipping fees on the customer’s
27 invoice. Where the Pass-Through Shippers or UPS Partners recoup the full amount
28 of the fraudulent charges, they are not injured by the Air-In-Ground program. The

1 Indirect Shippers, by contrast, are damaged as they would have been if they had
2 contracted for the shipment directly with UPS.

3 **140.** Under these circumstances, the shipping contract between the Pass-
4 Through Shipper or UPS Partner and UPS is intended to benefit the Indirect
5 Shipper for whom UPS delivered packages. That is, the Indirect Shippers are the
6 intended third-party beneficiaries of UPS's shipping contracts with the Pass-
7 Through Shippers and UPS Partners. UPS specifically agreed to confer the benefit
8 of the promised performance, namely air shipment, on the Indirect Shippers. In
9 addition, the Pass-Through Shipper or UPS Partner intended to provide the benefit
10 of UPS air shipment to the Indirect Shipper, its customer.

11 **141.** Because the Indirect Shippers were intended third-party beneficiaries
12 of UPS's contracts with Pass-Through Shippers or UPS Partners, the Indirect
13 Shippers have standing to assert claims for breach of those contracts against UPS.

14 **142.** The "In-Store Shipper" subclass consists of Class members who access
15 UPS shipping services through the UPS store or through affiliates such as the Retail
16 Franchises, UPS Alliance Locations, UPS Partners, and the Additional Shipping
17 Outlets. These Class members filled out a Shipping Document to select the
18 appropriate shipping service, but did not have the Website Terms referenced in their
19 Shipping Documents and did not have access to the UPS Website Terms at the time
20 of shipment. For members of this subclass, the Shipping Document makes up the
21 entire contract between the shipper and UPS.

22 **143.** Excluded from the Class are: (a) UPS and any entity in which UPS has
23 a controlling interest, and its legal representatives, officers, directors, assignees,
24 and/or successors; (b) any federal or state government or entity; and (c) any judge
25 to whom this case is assigned, together with any relative of such judge within the
26 third degree of relationship, and the spouse of any such person.

27 **144. Numerosity** – The Class is composed of thousands of persons and
28 entities throughout the United States. The joinder of such persons and entities in

1 one action is impracticable. The members of the Class are ascertainable and
2 identifiable (from UPS's own internal records) and the Class is manageable. The
3 Class members may be reasonably determined through discovery from the records
4 of UPS.

5 **145. Common Factual and Legal Issues** – There are questions of law and
6 fact common to the Class. The common legal and factual issues include, but are not
7 limited to, the following: (a) whether UPS has engaged in a pattern of racketeering
8 activity in connection with the diversion of air shipments to ground transportation;
9 (b) whether UPS has committed wrongful acts of wire fraud and mail fraud in
10 furtherance of its racketeering activity; (c) whether UPS has breached contracts
11 with Plaintiffs and the Class by charging for the air shipment level of service for
12 packages shipped by ground service; (d) whether UPS has breached contracts by
13 charging Plaintiffs and the Class for surcharges for aviation fuel for air packages
14 shipped by ground service; (e) whether UPS has made false and misleading
15 statements with the intent to defraud, deceive, and induce Plaintiffs and the Class;
16 (f) whether UPS has fraudulently failed to disclose that it was substituting ground
17 service for customers' purchased air services; (g) whether UPS has breached the
18 implied covenant of good faith and fair dealing by substituting ground
19 transportation for packages for which Plaintiffs and the Class had purchased air
20 shipping service and by charging surcharges for aviation fuel for "grounded out" air
21 shipments; (h) whether UPS has been unjustly enriched as a result of its practice of
22 substituting ground service for air service; and (i) whether Plaintiffs and the Class
23 are entitled to relief, including but not limited to, actual damages, treble damages,
24 punitive damages, and attorneys' fees.

25 **146. Typicality of Plaintiffs** – Plaintiffs' claims are typical of the claims of
26 the Class because all such claims arise out of the common wrongful conduct of
27 UPS's substituting ground service for purchased air shipment while charging the
28 customer for air shipment and improperly assessing surcharges for aviation fuel.

1 **147. Adequacy of Representation** – Plaintiffs and their attorneys will
2 fairly and adequately protect the interests of the Class. Plaintiffs have no interest
3 antagonistic to the Class. Plaintiffs have retained Class counsel experienced in the
4 prosecution of complex litigation, including complex class actions, and such
5 counsel will fully, fairly, and adequately represent Plaintiffs and the Class.

6 **148. Predominance and Superiority** – This class action is appropriate for
7 certification under F.R.C.P. 23(b)(3) because questions of law and fact common to
8 the members of the Class predominate over questions affecting only individual
9 members. A class action is superior to other available methods for the fair and
10 efficient adjudication of this controversy, since individual joinder of all Class
11 members is impracticable. Should individual Class members be required to bring
12 separate actions, this Court and courts throughout the United States would be
13 confronted with a multiplicity of lawsuits burdening the court system while also
14 creating the risk of inconsistent rulings and contradictory judgments. In contrast to
15 proceeding on a case-by-case basis, in which inconsistent results will magnify the
16 delay and expense to all parties and the court system, this class action is fully
17 manageable and will provide unitary adjudication, economies of scale, and
18 comprehensive supervision by a single Court.

19 **IX. THE DISCOVERY RULE**

20 **149.** The “discovery” rule is applicable to Plaintiffs’ California breach of
21 contract claims and RICO claims (as well as Plaintiffs’ other claims). For breach of
22 contract purposes, the “discovery” rule is a principle of California law which is
23 integral to the accrual of a breach of contract action and the enforcement of
24 contractual undertakings. The “discovery” rule is applicable to both statutory and
25 contractual periods of limitation. The “discovery” rule is not an enhancement or
26 enlargement of UPS’s contractual undertaking, but rather “triggers” the accrual of
27 liability. Moreover, for the reasons alleged herein, Plaintiffs and putative class
28 members could not have discovered and, therefore, could not have asserted their

1 claims or given notice to UPS within 180 days. Any such notice is excused as a
2 matter of standard contract interpretation. A party cannot give notice of a wrong
3 which it cannot discover and which is concealed by the other party.

4 **X. TOLLING OF APPLICABLE STATUTES OF LIMITATIONS AND
ESTOPPEL**

5
6 **150.** UPS had and continues to have superior knowledge to Plaintiffs and
the Class regarding its practice of substituting ground service for air shipments and
8 improperly assessing surcharges for aviation fuel for air shipments provided only
9 ground transportation. UPS concealed this practice and the fraudulent air shipment
10 charges and fraudulent surcharges for aviation fuel. Plaintiffs and the Class were
11 affirmatively misled by UPS's knowing and active concealment and would have
12 acted differently but for such concealment – i.e., Plaintiffs and the Class would not
13 knowingly pay two or three times as much for a (fake) air shipment if it is going to
14 be shipped (in actuality) by ground.

15 **151.** As a result of UPS's concealment, no cause of action accrued to
Plaintiffs and no applicable statute of limitations began to run until Plaintiffs'
17 recent discovery of the fraudulent practice of substituting ground service for air
18 service and improperly assessing surcharges for aviation fuel. Plaintiffs had no
19 basis or reason to suspect that UPS was charging for services that UPS never
20 rendered. Plaintiffs had no ability to protect their rights prior to such discovery.

21 **152.** Any notice or limitations periods have been tolled by UPS's knowing
and active concealment and intentionally misleading actions with respect to the
23 fraudulent practice of substituting ground service for air service and improperly
assessing surcharges for aviation fuel. UPS has concealed from Plaintiffs and the
25 Class vital information essential to the discovery and pursuit of their claims,
26 without any fault or lack of diligence on the part of Plaintiffs or the Class.
Plaintiffs and the Class could not reasonably have discovered this information at
any time sooner.

1 153. UPS's active concealment includes but is not limited to the following:

2 (a) falsely stating on the invoices or billings that the package was delivered by air

3 when, in fact, the package was delivered by ground; (b) placing air shipment labels

4 on packages which were actually delivered by ground; and (c) concealing UPS's

5 knowing diversion of air packages to ground shipment on the computerized

6 tracking system which UPS makes available to shippers. The computer tracking

7 system specifically identifies the purchased level of service (air shipment) (and

8 including, in some cases, surcharges for aviation fuel), but does not disclose that the

9 shipment was actually shipped by ground service.

10 **154.** UPS is also equitably estopped from relying on any purported notice of
11 claim requirements, pleading requirements, or shortened contractual or applicable
12 statutory limitations periods in defense of this action. The causes of action alleged
13 herein have not and will not properly accrue until full and complete disclosure of
14 the fraudulent practices of substituting ground service for air service (the Air-In-
15 Ground program) while still contracting and billing for air shipment and improperly
16 assessing surcharges for aviation fuel.

COUNT I

RICO CLAIM ON BEHALF OF PLAINTIFF ARAPAHOE HYUNDAI WITH REGARD TO

FUEL SURCHARGE CLAIMS

20 **155.** Plaintiff Arapahoe, individually and on behalf of the putative Class,
21 restates and incorporates herein, the preceding paragraphs of the Complaint. In this
22 Count, Plaintiff Arapahoe seeks damages related to Plaintiffs' Fuel Surcharge
23 Claims.

24 **156.** UPS committed the acts described in Appendix A and throughout this
25 Complaint in furtherance of the Air-In-Ground scheme. Upon information and
26 belief, in furtherance of the Air-In-Ground scheme, UPS sent Unishippers false and
27 fraudulent invoices as described in Appendix A, through the U.S. Mails in violation
28 of 18 U.S.C. § 1341 and/or via the internet or email in violation of 18 U.S.C. §

1 1343. Upon information and belief, Unishippers paid UPS for all of the Arapahoe
2 shipments set forth herein. Arapahoe Hyundai paid Unishippers for all of the
3 Arapahoe shipments set forth herein.

4 **157.** Plaintiff Arapahoe Hyundai was the direct and intended third-party
5 beneficiary of the contract between Unishippers and UPS for the shipments
6 described in Appendix A and throughout this Complaint. UPS had actual
7 knowledge that Arapahoe Hyundai was the direct and intended beneficiary based
8 upon UPS's own shipping documents.

9 **158.** UPS had actual knowledge that many shippers, such as Unishippers,
10 "passed on" UPS shipping charges to customers such as Plaintiff Arapahoe
11 Hyundai.

12 **159.** UPS's fraudulent scheme known as the Air-In-Ground program is
13 intended to sell and collect payment for air shipments while substituting ground
14 transportation. UPS's Air-In-Ground program constitutes a scheme or artifice to
15 defraud, or obtain money by means of false or fraudulent pretenses, representations,
16 or promises.

17 **160.** Because of UPS's knowing and active concealment, and misleading
18 actions and misrepresentations relating to the Air-In-Ground program, Plaintiffs
19 and the Class could not have reasonably discovered UPS's fraudulent diversion of
20 air shipments to ground transportation or UPS's wrongful application of surcharges
21 for aviation fuel.

22 **161.** As part of UPS's Air-In-Ground scheme, UPS imposed surcharges for
23 aviation fuel on shipments transported solely by ground.

24 **162.** UPS's deceptive practice of imposing these surcharges for aviation
25 fuel while hiding its diversion of Class members' packages to ground transportation
26 violates established public policy and is immoral, unethical, oppressive,
27 unscrupulous and substantially injurious to consumers.

28 **163.** Plaintiffs and the Class have been damaged as a direct and proximate

1 result of UPS's participation in the enterprise in the amount of billions of dollars.
2 Damages incurred by Plaintiffs and the Class include money paid as a result of
3 UPS's fraudulent surcharges for aviation fuel.

4 **COUNT II**

5 **RICO CLAIM ON BEHALF OF PLAINTIFF ARAPAHOE HYUNDAI WITH REGARD TO**
6 **AIR SERVICE CLAIMS**

7 **164.** Plaintiff Arapahoe, individually and on behalf of the putative Class,
8 restates and incorporates herein, the preceding paragraphs of the Complaint. In this
9 Count, Plaintiff Arapahoe seeks damages for Air Service Claims.

10 **165.** UPS committed the acts described in Appendix A and throughout this
11 Complaint in furtherance of the Air-In-Ground scheme. Upon information and
12 belief, in furtherance of the Air-In-Ground scheme, UPS sent Unishippers false and
13 fraudulent invoices as described in Appendix A through the U.S. Mails in violation
14 of 18 U.S.C. § 1341 and/or via the internet or email in violation of 18 U.S.C. §
15 1343. Upon information and belief, Unishippers paid UPS for all of the Arapahoe
16 shipments set forth herein. Arapahoe Hyundai paid Unishippers for all of the
17 Arapahoe shipments set forth herein.

18 **166.** Plaintiff Arapahoe Hyundai was the direct and intended third-party
19 beneficiary of the contract between Unishippers and UPS for the shipments
20 described in Appendix A and throughout this Complaint. UPS had actual
21 knowledge that Arapahoe Hyundai was the direct and intended beneficiary based
22 upon UPS's own shipping documents.

23 **167.** UPS had actual knowledge that many shippers, such as Unishippers,
24 "passed on" UPS shipping charges to customers such as Plaintiff Arapahoe
25 Hyundai.

26 **168.** UPS's fraudulent scheme known as the Air-In-Ground program is
27 intended to sell and collect payment for air shipments while substituting ground
28 transportation. UPS's Air-In-Ground program constitutes a scheme or artifice to

1 defraud, or obtain money by means of false or fraudulent pretenses, representations,
2 or promises.

3 **169.** Because of UPS's knowing and active concealment, and misleading
4 actions and misrepresentations relating to the Air-In-Ground program, Plaintiffs
5 and the Class could not have reasonably discovered UPS's fraudulent diversion of
6 air shipments to ground transportation.

7 **170.** Plaintiffs and the Class have been damaged as a direct and proximate
8 result of UPS's participation in the enterprise in the amount of billions of dollars.
9 Damages incurred by Plaintiffs and the Class include money paid as a result of
10 UPS's fraudulent bills and charges for air shipments sent by ground.

COUNT III

**RICO CLAIM ON BEHALF OF PLAINTIFFS DESIGNER, POCINO AND OWENS WITH
REGARD TO FUEL SURCHARGE CLAIMS**

14 **171.** Plaintiffs, individually and on behalf of the putative Class, restate and
15 incorporate herein the preceding paragraphs of the Complaint.

16 **172.** In this Count, Plaintiffs Designer, Pocino and Owens seek damages for
17 Plaintiffs' Fuel Surcharge Claims. UPS committed the acts described in Appendix
18 A and throughout this Complaint in furtherance of the Air-In-Ground scheme.
19 Upon information and belief, in furtherance of the Air-In-Ground scheme, UPS sent
20 these Plaintiffs false and fraudulent invoices as described in Appendix A through
21 the U.S. Mails in violation of 18 U.S.C. § 1341 and/or via the internet or email in
22 violation of 18 U.S.C. § 1343. Plaintiffs Designer, Pocino, and Owens paid the
23 UPS Invoices referenced in said paragraphs.

24 **173.** UPS's fraudulent scheme known as the Air-In-Ground program is
25 intended to sell and collect payment for air level of service while substituting
26 ground service. UPS's Air-In-Ground program constitutes a scheme or artifice to
27 defraud, or obtain money by means of false or fraudulent pretenses, representations,
28 or promises.

1 **174.** UPS's predicate offenses with respect to Plaintiffs Pocino, Designer
2 Imports and Owens are directly "related" to the activities of the enterprise; they are
3 the identical racketeering activities that UPS conducted through the enterprise: mail
4 and wire fraud designed to conceal UPS's "Air-In-Ground" program and permit
5 UPS to continue reaping hundreds of millions of dollars in fraudulent profits.

6 **175.** Each of the acts of mail and wire fraud that injured the Plaintiffs were
7 part of the same "pattern" of racketeering activity comprising the fraudulent "Air-
8 In-Ground" program. These acts had and have the same or similar purposes,
9 results, participants, victims, or methods of commission, or otherwise are
10 interrelated. To conduct the fraudulent "Air-In-Ground" scheme, UPS needed to
11 carry out the scheme through its shipping network including shipments for which
12 shippers directly contract with UPS.

13 **176.** It was necessary for UPS to commit the same predicate acts of mail
14 fraud and wire fraud with respect to Plaintiffs Designer, Pocino, and Owens to
15 conceal UPS's fraudulent scheme. These predicate acts are related to activities of
16 the enterprise (association-in-fact), because they enabled the activities of the
17 enterprise by concealing the fraud.

18 **177.** UPS could not have carried out its Air-In-Ground program without
19 conducting the same fraudulent activities through all branches of its shipping
20 network (the association-in-fact enterprise). Otherwise UPS's fraudulent scheme
21 would have been exposed. UPS had to effect its scheme to defraud and commit the
22 same predicate acts of mail fraud and wire fraud (fraudulent and misleading
23 Invoices) on customers such as Plaintiffs Designer, Pocino, and Owens. Otherwise,
24 the Air-In-Ground program would have been discovered.

25 **178.** The predicate offenses in issue including Plaintiffs Owens, Designer,
26 and Pocino are directly and inextricably related to the actions of the UPS RICO
27 enterprise.

28 **179.** UPS was enabled to commit the predicate offenses against Plaintiffs

1 Owens, Designer, and Pocino by virtue of UPS's position in the enterprise or its
2 conduct in or control over the affairs of the enterprise. The predicate acts in issue
3 are interdependent or interrelated.

4 **180.** Because of UPS's knowing and active concealment, and misleading
5 actions and misrepresentations relating to the Air-In-Ground program, Plaintiffs
6 and the Class could not have reasonably discovered UPS's fraudulent diversion of
7 air shipments to ground transportation or UPS's wrongful imposition of surcharges
8 for aviation fuel.

9 **181.** Plaintiffs and the Class have been damaged as a direct and proximate
10 result of UPS's participation in the enterprise in the amount of hundreds of millions
11 of dollars. Damages incurred by Plaintiffs and the Class include money paid as a
12 result of UPS's fraudulent surcharges for aviation fuel.

COUNT IV

**RICO CLAIM ON BEHALF OF PLAINTIFFS DESIGNER, POCINO AND OWENS WITH
REGARD TO AIR SERVICE CLAIMS**

16 **182.** Plaintiffs, individually and on behalf of the putative Class, restate and
17 incorporate herein the preceding paragraphs of the Complaint.

18 **183.** In this Count, Plaintiffs Designer, Pocino and Owens seek damages for
19 both Air Service Claims. UPS committed the acts described in Appendix A and
20 throughout this Complaint in furtherance of the Air-In-Ground scheme. Upon
21 information and belief, in furtherance of the Air-In-Ground scheme, UPS sent these
22 Plaintiffs false and fraudulent invoices as described in Appendix A through the U.S.
23 Mails in violation of 18 U.S.C. § 1341 and/or via the internet or email in violation
24 of 18 U.S.C. § 1343. Plaintiffs Designer, Pocino, and Owens paid the UPS
25 Invoices referenced in said paragraphs.

26 **184.** UPS's fraudulent scheme known as the Air-In-Ground program is
27 intended to sell and collect payment for air level of service while substituting
28 ground service. UPS's Air-In-Ground program constitutes a scheme or artifice to

1 defraud, or obtain money by means of false or fraudulent pretenses, representations,
2 or promises.

3 **185.** UPS's predicate offenses with respect to Plaintiffs Pocino, Designer
4 Imports and Owens are directly "related" to the activities of the enterprise; they are
5 the identical racketeering activities that UPS conducted through the enterprise: mail
6 and wire fraud designed to conceal UPS's "Air-In-Ground" program and permit
7 UPS to continue reaping hundreds of millions of dollars in fraudulent profits.

8 **186.** Each of the acts of mail and wire fraud that injured the Plaintiffs were
9 part of the same "pattern" of racketeering activity comprising the fraudulent "Air-
10 In-Ground" program. These acts had and have the same or similar purposes,
11 results, participants, victims, or methods of commission, or otherwise are
12 interrelated. To conduct the fraudulent "Air-In-Ground" scheme, UPS needed to
13 carry out the scheme through its shipping network including shipments for which
14 shippers directly contract with UPS.

15 **187.** It was necessary for UPS to commit the same predicate acts of mail
16 fraud and wire fraud with respect to Plaintiffs Designer, Pocino, and Owens to
17 conceal UPS's fraudulent scheme. These predicate acts are related to activities of
18 the enterprise (association-in-fact), because they enabled the activities of the
19 enterprise by concealing the fraud.

20 **188.** UPS could not have carried out its Air-In-Ground program without
21 conducting the same fraudulent activities through all branches of its shipping
22 network (the association-in-fact enterprise). Otherwise UPS's fraudulent scheme
23 would have been exposed. UPS had to effect its scheme to defraud and commit the
24 same predicate acts of mail fraud and wire fraud (fraudulent and misleading
25 Invoices) on customers such as Plaintiffs Designer, Pocino, and Owens. Otherwise,
26 the Air-In-Ground program would have been discovered.

27 **189.** The predicate offenses in issue including Plaintiffs Owens, Designer,
28 and Pocino are directly and inextricably related to the actions of the UPS RICO

1 enterprise.

2 **190.** UPS was enabled to commit the predicate offenses against Plaintiffs
3 Owens, Designer, and Pocino by virtue of UPS's position in the enterprise or its
4 conduct in or control over the affairs of the enterprise. The predicate acts in issue
5 are interdependent or interrelated.

6 **191.** Because of UPS's knowing and active concealment, and misleading
7 actions and misrepresentations relating to the Air-In-Ground program, Plaintiffs
8 and the Class could not have reasonably discovered UPS's fraudulent diversion of
9 air shipments to ground transportation or UPS's wrongful imposition of surcharges
10 for aviation fuel.

11 **192.** Plaintiffs and the Class have been damaged as a direct and proximate
12 result of UPS's participation in the enterprise in the amount of hundreds of millions
13 of dollars. Damages incurred by Plaintiffs and the Class include money paid as a
14 result of UPS's fraudulent bills and charges for air shipments sent by ground.

COUNT V
RICO CONSPIRACY CLAIM

17 **193.** Plaintiffs, individually and on behalf of the putative Class, restate and
18 incorporate herein the preceding paragraphs of the Complaint.

19 **194.** This Count, which alleges violations of RICO as provided in 18 U.S.C.
20 § 1962(d), is asserted against Defendant UPS and Defendants DOES on behalf of
21 Plaintiffs and the Class.

22 **195.** Plaintiffs, the Class, UPS and Defendants DOES are “persons” as that
23 term is defined by 18 U.S.C. § 1961(3) because they are individuals or entities
24 capable of holding a legal or beneficial interest in property.

25 **196.** Parent UPS, the UPS subsidiaries, and Defendants DOES conspired to
26 violate 18 U.S.C. § 1962(c) by conducting and participating in the affairs of an
27 association-in-fact enterprise through their pattern of racketeering activity in
28 furtherance of the Air-In-Ground scheme.

1 **197.** Parent UPS, the UPS subsidiaries, and Defendants DOES agreed to
2 participate in the association-in-fact enterprise described in this Complaint, and to
3 conduct and participate in that enterprise's affairs through the pattern of
4 racketeering activity described in Appendix A and throughout this Complaint.

5 **198.** Plaintiffs and the Class have been damaged in the amount of billions
6 of dollars as a direct and proximate result of Defendants conspiring to violate 18
7 U.S.C. § 1962(c). Damages incurred by Plaintiffs and the Class include money
8 paid as a result of UPS's fraudulent bills and charges for air shipments sent by
9 ground and for fraudulent surcharges for aviation fuel.

10 **COUNT VI**

11 **BREACH OF CONTRACT AS TO PRE-2009 SURCHARGES FOR AVIATION FUEL**

12 **199.** Plaintiffs, individually and on behalf of the putative Class, restate and
13 incorporate herein the preceding paragraphs of the Complaint.

14 **200.** Nothing in UPS's Pre-2009 Fuel Surcharge Clause provided any notice
15 to Plaintiffs and Class members regarding UPS's scheme to charge surcharges for
16 aviation fuel to Plaintiffs and Class members for packages only provided ground
17 service. The Pre-2009 Fuel Surcharge Clause does not in any respect base the
18 applicable fuel surcharge on the service selected by the shipper regardless of mode
19 of transportation. The Pre-2009 Fuel Surcharge Clause and related materials
20 regarding fuel surcharges at UPS.com simply describe the surcharge for aviation
21 fuel and ground surcharge as separate and distinct charges.

22 **201.** Rather, since the fuel surcharge purported to reimburse UPS for the
23 cost of fuel expended in air transportation, Plaintiffs and Class members reasonably
24 believed that UPS's diesel fuel surcharge applied to ground service packages, while
25 UPS's surcharge for aviation fuel applied to "air" level of service.

26 **202.** The Pre-2009 Fuel Surcharge Clause does not authorize UPS to assess
27 a surcharge for aviation fuel for ground delivery. The only reasonable
28 interpretation of the Pre-2009 Fuel Surcharge Clause is that UPS will assess

surcharges for aviation fuel for air services actually provided and not for ground service.

3 **203.** UPS materially breached its contracts for air shipment with Plaintiffs
4 and the Class by assessing surcharges for aviation fuel for packages delivered by
5 ground service.

204. Conditions precedent to the commencement of this action, if any, have been performed, waived, or excused.

8 **205.** Plaintiffs and the Class are excused from complying with any terms of
9 any contracts regarding purported notice, pleading, or other claim filing
10 requirements and/or limitations, and UPS is barred from enforcing any such
11 requirements or limitations based upon UPS's fraudulent concealment and the
12 doctrines of equitable estoppel and unconscionability. Performance by Plaintiffs
13 and the Class is excused by UPS's material breaches.

14 **206.** Plaintiffs and the Class have sustained substantial economic loss and
15 damages as a direct and proximate result of UPS's breaches of the contracts.

16 **207.** UPS is liable to Plaintiffs and the Class for the difference in price
17 between the surcharges for aviation fuel and the surcharges for diesel fuel.

COUNT VII

BREACH OF CONTRACT AS TO POST-2009 SURCHARGES FOR AVIATION FUEL

20 **208.** Plaintiffs, individually and on behalf of the putative Class, restate and
21 incorporate herein the preceding paragraphs of the Complaint.

22 **209.** The purposeful assessment of an inapplicable surcharge for aviation
23 fuel to ground-delivered packages is part of UPS's concerted effort to perpetuate
24 and hide the Air-In-Ground scheme. The surcharge for aviation fuel also is a means
25 to obtain additional, unwarranted profits at the expense of Plaintiffs and the Class.

26 **210.** On the current UPS Website, there is a link for “Fuel Surcharge.”
27 There is no language in this description of UPS’s fuel surcharge that purports to
28 provide notice to customers regarding UPS’s scheme to charge surcharges for

1 aviation fuel to Plaintiffs and Class members for packages shipped by ground
2 service.

3 **211.** No reasonable shipper would have reason to look beyond the portion
4 of the UPS website that is specifically highlighted “Fuel Surcharge” to the more
5 generic link to “UPS Tariff / Terms and Conditions of Service.”

6 **212.** In the Post-2009 Fuel Surcharge Clause, UPS first purported to link
7 the fuel surcharge to the level of service provided regardless of actual mode of
8 transportation. Thus, January 2009 is the first time that UPS attempted to base both
9 Level of Service Charges and surcharges for aviation fuel on the service selected by
10 the UPS customer, regardless of whether UPS actually provided that service or
11 secretly substituted ground delivery. In addition, even after January 2009, the UPS
12 website information substantially “tracks” the Pre-2009 Fuel Surcharge Clause and
13 thus conflicts with the current Fuel Surcharge Clause. Nothing in the website
14 language relates specifically to “fuel surcharges” alerts the shipper to check the
15 Website Terms for different information. It is reasonable that a customer would
16 rely upon the specific fuel surcharge information on the website and not search the
17 Website Terms.

18 **213.** Additionally, the Post-2009 Fuel Surcharge Clause contains the same
19 ambiguities and internal contradictions arising from the “mode of transportation”
20 language of Section 36. Even for shipments made after January 5, 2009, no
21 reasonable customer would expect to pay a premium for jet fuel that UPS knows in
22 advance it will never use. Thus, nothing in the UPS Website Terms permits UPS to
23 impose a surcharge based on aviation fuel for packages that use no aviation fuel
24 whatsoever.

25 **214.** Rather, since the fuel surcharge purported to reimburse UPS for the
26 cost of fuel expended in air transportation, Plaintiffs and Class members reasonably
27 believed that UPS’s diesel fuel surcharge applied to ground service packages, while
28 UPS’s surcharges for aviation fuel applied to “air” levels of service.

215. UPS materially breached its contracts for air shipment with Plaintiffs and the Class by assessing surcharges for aviation fuel for packages delivered by ground service.

216. Conditions precedent to the commencement of this action, if any, have been performed, waived, or excused.

217. Plaintiffs and the Class are excused from complying with any terms of any contracts regarding purported notice, pleading, or other claim filing requirements and/or limitations, and UPS is barred from enforcing any such requirements or limitations based upon UPS's fraudulent concealment and the doctrines of equitable estoppel and unconscionability. Performance by Plaintiffs and the Class is excused by UPS's material breaches.

218. Plaintiffs and the Class have sustained substantial economic loss and damages as a direct and proximate result of UPS's breaches of the contracts.

219. UPS is liable to Plaintiffs and the Class for the difference in price between the surcharge for aviation fuel and the surcharge for diesel fuel on each “grounded-out” shipment.

COUNT VIII

BREACH OF CONTRACT AS TO AIR SERVICE CLAIMS

220. Plaintiffs, individually and on behalf of the putative Class, restate and incorporate herein the preceding paragraphs of the Complaint.

221. Plaintiffs also allege as to this Cause of Action these additional facts:

222. A fundamental, bedrock principle of contract law is that the Court must give effect to the reasonable expectations of the parties. UPS cannot reasonably deny that a shipper who selects an “air” level of service and is billed the much higher price for that level of service reasonably expects that UPS has actually provided “air” service. That expectation is certainly reasonable where UPS advises that “from the array of services” in the Guide, the shipper should “determine the service that best meets your needs.” The expectation is also reasonable where UPS

1 represents that “air” service has been provided in the Subsequent Shipping
2 Documents, and the shipper pays for the service selected on the original Shipping
3 Document based upon the Invoice reflecting that service.

4 **223.** UPS ignores the fact it has predetermined those instances in which
5 “air” service will never be available; that, in many instances, “air” service is
6 unnecessary to obtain the specified delivery time; and that, had the shipper selected
7 ground service, the package would arrive at the same time in many instances which
8 are concealed by UPS in the Guide and otherwise.

9 **224.** The original Shipping Document, which is what the shipper uses to
10 initiate each individual contract, makes no reference to substituting mode of
11 transportation or charging surcharges for aviation fuel for ground deliveries. This
12 Document provides no reasonable notice to the shipper of the Air-In-Ground
13 program or UPS’s predetermined plan to bill and collect for “air” level of service it
14 never provides and to charge surcharges for aviation fuel for ground delivery.

15 **225.** The Invoices (and “tracking” and “proof of delivery” reports) cannot
16 reasonably be separated from the original Shipping Document, the Tariff and the
17 Guide. They are an integral part of the UPS scheme to defraud.

18 **226.** The Subsequent Shipping Documents do not in any respect reference
19 the service “selected” by the shipper. These documents all identify the “service” as
20 “air.” The only reasonable interpretation of these Documents is that UPS has
21 actually provided the “air” level of service.

22 **227.** Section 36 cannot be viewed in the abstract. It does not authorize UPS
23 to “offer” specified “air” levels of service which UPS knows in advance it will not
24 provide. It does not authorize UPS to conceal all shipments for which UPS has
25 substituted ground transportation. It does not authorize UPS to falsely represent
26 that only “air” service is available for letter shipments. It does not authorize UPS to
27 conceal that much cheaper ground delivery will arrive in many instances at the
28 desired delivery time. It does not authorize UPS to misrepresent on the Subsequent

1 Shipping Documents the service that UPS has actually provided.

2 **228.** The Air-In-Ground scheme could not withstand the light of day. No
3 reasonable shipper would pay a much higher price for the “air” level of service if
4 the shipper knew that the package would be shipped by ground or that the “air”
5 level of service was unnecessary to obtain the desired delivery time.

6 **229.** Plaintiffs and the Class entered into contracts with UPS whereby UPS
7 agreed to ship packages for Plaintiffs and the Class based upon a pre-determined
8 rate and Plaintiffs’ selected level of service (e.g., Next Day Air or 2nd Day Air).

9 **230.** The contracts in issue are adhesion contracts.

10 **231.** The physical characteristics of the original Shipping Document do not
11 provide UPS’s customers, including Plaintiffs and the Class, reasonable notice of
12 the existence of important terms and conditions. UPS does not reasonably advise
13 UPS’s customers, including Plaintiffs and the Class, of the terms of the Air-In-
14 Ground program.

15 **232.** When Plaintiffs entered into the contracts with UPS, Plaintiffs had
16 before them only the original Shipping Document. On that form, Plaintiffs selected
17 the level of service desired (e.g., Next Day Air or 2nd Day Air).

18 **233.** Plaintiffs reasonably believed that by selecting, for example, “Next
19 Day Air” service, they were purchasing “air shipment with delivery the following
20 day.” This is the plain meaning of the name of the service Plaintiffs and the Class
21 purchased. Likewise, Plaintiffs and the Class reasonably believed that by selecting
22 “2nd Day Air” service, they were purchasing “air shipment with delivery in two
23 days.”

24 **234.** On information and belief, UPS understood that Plaintiffs and Class
25 members believed they would receive air service, as indicated by the plain meaning
26 of the selected Next Day Air or 2nd Day Air service.

27 **235.** Plaintiffs and the Class attached to the terms Next Day Air, 2nd Day
28 Air, and “service selected by the shipper” the plain meaning of the words used, and

1 had no reason to know of any different meaning attached to these terms by UPS.
2 UPS had reason to believe that Plaintiffs and the Class would attribute the plain
3 meaning of the words used to those terms, and further encouraged Plaintiffs'
4 understanding by continuing to use the terms on all documents associated with the
5 shipments and by charging a fuel surcharge based on jet fuel. Under basic
6 principles of contract interpretation, the meaning that Plaintiffs and the Class
7 attached to those terms controls. *See, e.g.*, Restatement (Second) of Contracts §
8 201. UPS, by its continued use of materials regarding "Next Day Air" or "2nd Day
9 Air" (including, but not limited to, Shipping Documents, advertisements, labels,
10 and Subsequent Shipping Documents), indicated to Plaintiffs that UPS was
11 providing air service. (*See* Exhs. 1-29).

12 **236.** The UPS Website Terms are available only at www.ups.com. In-Store
13 Shippers did not have access to the UPS Website Terms at the time of shipment.
14 The Website Terms were, therefore, not adequately incorporated by reference into
15 the shipping contracts between UPS and the In-Store Shipper subclass.

16 **237.** There are direct contradictions, ambiguities, and false statements in the
17 Guide, the UPS website information, and the Subsequent Shipping Documents as
18 alleged herein. In particular, the UPS statements that only "air" delivery and
19 statements regarding delivery times in the Guide are false and misleading.
20 Statements on the UPS Website regarding post-January 2009 fuel surcharges also
21 contradict the Post- 2009 Fuel Surcharge Clause.

22 **238.** Even for those Class members who did have access to UPS's Website
23 Terms, in light of the Shipping Documents (example at Exhs. 1-2), the language in
24 those Terms purporting to permit UPS to "use any mode of transportation" to
25 "provide the service selected by the shipper" is ambiguous.

26 **239.** Reasonable Class members selecting Next Day Air or 2nd Day Air
27 service on the Shipping Documents (Exhs. 1-2) and reviewing the language of
28 UPS's Website Terms (Exh. 30) would be confused by the apparent contradiction

1 in permitting UPS to use any “mode of transportation” while still requiring UPS to
2 provide the “service selected by the shipper,” because the plain meaning of “Next
3 Day Air” service is “shipment by air, with delivery within the next day” and the
4 plain meaning of “2nd Day Air” service is “shipment by air, with delivery within
5 two days.”

6 **240.** Class members faced with this ambiguity would reasonably interpret
7 the language of UPS’s Website Terms to mean (1) that UPS could use any form of
8 air shipment to provide the air service selected; and/or (2) that UPS could use, for
9 example, a truck, train, or plane to provide a service such as UPS’s “Three Day
10 Select.” Reasonable Class members would not understand that UPS could charge
11 them for air service and ship their packages by ground transportation. Such an
12 interpretation is not reasonable because, by doing so, UPS would no longer be
13 providing the “service selected by the shipper,” and would instead be providing an
14 entirely different (and less expensive) service – the Ground service.

15 **241.** This is particularly true for the many customers, including Plaintiffs
16 and Class members, for whom the air service selected did not even provide any
17 earlier time of delivery guarantee than the ground service the customers could have
18 purchased for far less money. Such customers would never reasonably interpret the
19 clause concerning “mode of transportation” to authorize UPS to collect high
20 premiums for, literally, no difference in service at all. Such customers would,
21 under one of the interpretations above, reasonably conclude that, despite the “mode
22 of transport” clause in the UPS Website Terms, “air” would still mean “air.”

23 **242.** Plaintiffs reasonably expected that, pursuant to the Shipping
24 Documents, UPS would provide the service Plaintiffs selected (Next Day Air or
25 2nd Day Air) by transporting Plaintiffs’ packages by air shipment, with delivery
26 within one or two days.

27 **243.** Consistent with this expectation, Plaintiffs paid UPS for air shipment,
28 including a surcharge for aviation fuel.

1 **244.** To implement the reasonable expectation of the Plaintiffs (and other
2 shippers), the shipping contracts must be interpreted in favor of the shippers who
3 did not reasonably know of UPS's purported intent regarding its Air service
4 charges.

5 **245.** Further, the Air-In-Ground program is inconsistent with and not
6 justified by the "discretion" language in Section 36. To the contrary, UPS is not
7 exercising any discretion in any reasonable sense when it has predetermined on an
8 "across the board" basis that the "air" level of service will never be available for
9 packages subject to the Air-In-Ground program. To the contrary, Plaintiffs allege
10 that UPS has systematically and deliberately instituted its Air-In-Ground program
11 in order to predetermine which shipments will be transported by ground,
12 notwithstanding UPS's collection of Air service charges and surcharges for aviation
13 fuel.

14 **246.** Plaintiffs and the Class have performed all conditions required of them
15 under the contracts by paying the agreed upon rate for air shipment of the packages
16 and by paying the surcharges for aviation fuel.

17 **247.** UPS has materially breached its contracts for air shipment with
18 Plaintiffs and the Class, created by Plaintiffs and the Class selecting Next Day Air
19 or 2nd Day Air service on the Shipping Documents and paying UPS for such
20 service, by substituting ground transportation for packages for which Plaintiffs and
21 Class members had contracted and paid for air shipping services.

22 **248.** UPS has breached its contracts for air shipment with Plaintiffs and the
23 Class by failing to exercise discretion regarding shipments for which UPS
24 substitutes an alternative mode of transportation; instead, UPS has systematically
25 and deliberately predetermined which shipments will be transported by ground,
26 notwithstanding UPS's collection of Air service charges and surcharges for aviation
27 fuel.

28 **249.** Conditions precedent to the commencement of this action, if any, have

1 been performed, waived, or excused.

2 **250.** Plaintiffs and the Class are excused from complying with any terms of
3 any contracts regarding purported notice, pleading, or other claim filing
4 requirements and/or limitations, and UPS is barred from enforcing any such
5 requirements or limitations based upon UPS's fraudulent concealment and the
6 doctrines of equitable estoppel and unconscionability. Performance by Plaintiffs
7 and the Class is excused by UPS's material breaches.

8 **251.** Plaintiffs and the Class have sustained substantial economic loss and
9 damages as a direct and proximate result of UPS's breaches of the contracts.

10 **252.** UPS is liable to Plaintiffs and the Class for the difference in price
11 between the air shipments purchased and the ground shipments provided.

12 **COUNT IX**

13 **FRAUDULENT INDUCEMENT**

14 **253.** Plaintiffs, individually and on behalf of the putative Class, restate and
15 incorporate herein the preceding paragraphs of the Complaint.

16 **254.** This Count, which alleges fraudulent inducement, is asserted against
17 Defendant UPS on behalf of Plaintiffs and the Class.

18 **255.** UPS falsely and fraudulently represented to Plaintiffs and the Class
19 that they were purchasing and would receive "air" shipping services from UPS.
20 UPS also fraudulently represented that "air" level of service was necessary to
21 obtain desired delivery times.

22 **256.** UPS falsely and fraudulently represented to Plaintiff and the Class that
23 they were purchasing and would receive "air" shipping services from UPS. UPS
24 falsely and fraudulently concealed material facts and/or failed to disclose material
25 facts UPS had a duty to disclose.

26 **257.** UPS's representations were, in fact, false. The true facts, as alleged
27 above, were that UPS was intentionally and systematically rerouting packages for
28 which Plaintiffs and the Class purchased UPS air shipping services from air

1 transportation to ground transportation and charging higher surcharges for aviation
2 fuel for shipments that traveled only by ground.

3 **258.** UPS also misrepresented that letters could be shipped only by Next
4 Day Air or 2nd Day Air.

5 **259.** When UPS made the representations to Plaintiffs and the Class, UPS
6 knew them to be false, and UPS made the representations with the intent to defraud
7 and deceive Plaintiffs and the Class.

8 **260.** Plaintiffs and the Class, at the time these representations were made
9 and at the time they entered into the agreement with UPS by purchasing UPS air
10 shipping services, were ignorant of the falsity of UPS's representations and
11 believed them to be true. In reliance on UPS's representations, Plaintiffs and the
12 Class were fraudulently induced to enter into air shipping contracts with UPS.

13 **261.** Had Plaintiffs and the Class known the actual facts, they would not
14 have entered into the contracts for UPS's air shipping services.

15 **262.** Plaintiffs and the Class were justified in relying on UPS's
16 representations due to the circumstances alleged above, including but not limited to
17 UPS's practice of concealing the Air-In-Ground program and UPS's reputation as
18 an honest corporation. Plaintiffs and the Class had no reason to suspect that UPS
19 intended to breach the shipping contract.

20 **263.** As a direct and proximate result of UPS's misrepresentations and
21 failure to disclose facts as alleged above, Plaintiffs and the Class have been
22 damaged in an amount to be proven at trial.

23 **264.** The aforementioned conduct of UPS was willful and was intended to
24 cause injury to Plaintiffs and the Class. Plaintiffs and the Class are informed and
25 believe, and based thereon allege, that instead of presenting the facts as UPS knew
26 them to be, UPS engaged in a willful scheme to defraud Plaintiffs and the Class by
27 concealing the fact that UPS was substituting far less costly ground transportation
28 for the expensive "air" services purchased by Plaintiffs and the Class. Plaintiffs

1 and the Class are therefore entitled to an award of exemplary or punitive damages.

2 **COUNT X**

3 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND**
4 **FAIR DEALING WITH RESPECT TO THE FUEL SURCHARGE CLAIM**

5 265. Plaintiffs, individually and on behalf of the putative Class, restate and
6 incorporate herein the preceding paragraphs of the Complaint.

7 266. This Count, which alleges breach of the implied covenant of good faith
8 and fair dealing with respect to UPS's surcharges for aviation fuel, is asserted
9 against Defendant UPS on behalf of Plaintiffs and the Class.

10 267. Plaintiffs and the Class entered into shipping contracts with UPS under
11 which Plaintiffs and the Class purchased air shipping services from UPS.

12 268. Plaintiffs and the Class performed all of their obligations pursuant to
13 the shipping contracts by paying UPS's stated rates for air shipping services,
14 including surcharges for aviation fuel.

15 269. Implied in every contract is a covenant of good faith and fair dealing
16 by each party not to do anything that will deprive the other parties thereto of the
17 benefits of the contract. This covenant imposes on each contracting party the duty
18 to refrain from doing anything which would render performance of the contract
19 impossible by any act of his or her own. This covenant also imposes a duty on each
20 contracting party to do everything that the contract presupposes that he or she will
21 do to accomplish the contract's purpose.

22 270. UPS breached the implied covenant of good faith and fair dealing in
23 the contracts it entered into with Plaintiffs and the Class by charging surcharges for
24 aviation fuel for "grounded-out" air shipments, as alleged herein. Had the parties
25 negotiated in advance whether UPS could charge Plaintiffs and the Class a
26 surcharge for aviation fuel that UPS knew it would never use in shipping the
27 packages of Plaintiffs and the Class, Plaintiffs and the Class would not have agreed
28 to such terms.

1 **271.** UPS, by imposing a surcharge for aviation fuel where no aviation fuel
2 would be used to transport the packages of Plaintiffs and the Class, unfairly
3 interfered with the rights of Plaintiffs and the Class to receive the benefits of the
4 contract, by charging an amount purporting to compensate UPS for an expenditure
5 UPS never made.

6 **272.** UPS had no discretion to charge surcharges for aviation fuel for
7 “grounded-out” air shipments. To the extent UPS claims it had any such discretion,
8 it abused that discretion and breached the implied covenant of good faith and fair
9 dealing by systematically acting to defeat the benefits of the contracts with
10 Plaintiffs and the Class.

11 **273.** As a direct and proximate result of UPS's breach of the implied
12 covenant of good faith and fair dealing, and the facts alleged herein, Plaintiffs and
13 the Class have been damaged in an amount to be proved at trial.

COUNT XI

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WITH RESPECT TO AIR SERVICE CLAIM

17 **274.** Plaintiffs, individually and on behalf of the putative Class, restate and
18 incorporate herein the preceding paragraphs of the Complaint.

19 **275.** This Count, which alleges breach of the implied covenant of good faith
20 and fair dealing with respect to Air services, is asserted against Defendant UPS on
21 behalf of Plaintiffs and the Class.

22 **276.** Plaintiffs and the Class entered into shipping contracts with UPS under
23 which Plaintiffs and the Class purchased air shipping services from UPS.

24 **277.** Plaintiffs and the Class performed all of their obligations pursuant to
25 the shipping contracts by paying UPS's stated rates for air shipping services,
26 including surcharges for aviation fuel. No condition precedent remained to UPS's
27 obligation to ship the packages of Plaintiffs and the Class by air.

278. Implied in every contract is a covenant of good faith and fair dealing

1 by each party not to do anything that will deprive the other parties thereto of the
2 benefits of the contract. This covenant imposes on each contracting party the duty
3 to refrain from doing anything which would render performance of the contract
4 impossible by any act of his or her own. This covenant also imposes a duty on each
5 contracting party to do everything that the contract presupposes that he or she will
6 do to accomplish the contract's purpose.

7 **279.** UPS breached the implied covenant of good faith and fair dealing in
8 the contracts it entered into with Plaintiffs and the Class by substituting ground
9 service for packages for which Plaintiffs and the Class had purchased air shipping
10 services. Had the parties negotiated in advance whether UPS could charge
11 Plaintiffs and the Class for air shipping services and then, in fact, provide far less
12 expensive ground services, Plaintiffs and the Class would not have agreed to such
13 terms.

14 **280.** UPS, by substituting ground service for air service through its Air-In-
15 Ground program, unfairly interfered with the rights of Plaintiffs and the Class to
16 receive the benefits of the contract, specifically air shipping.

17 **281.** UPS had no discretion to ship packages in any way not contemplated
18 by the air shipping service contracts with Plaintiffs and the Class. To the extent
19 UPS claims it had any such discretion, it abused that discretion and breached the
20 implied covenant of good faith and fair dealing by systematically acting to defeat
21 the benefits of the contracts with Plaintiffs and the Class.

22 **282.** As a direct and proximate result of UPS's breach of the implied
23 covenant of good faith and fair dealing, and the facts alleged herein, Plaintiffs and
24 the Class have been damaged in an amount to be proved at trial.

COUNT XII

UNJUST ENRICHMENT WITH RESPECT TO FUEL SURCHARGE CLAIM

27 **283.** Plaintiffs, individually and on behalf of the putative Class, restate and
28 incorporate herein the preceding paragraphs of the Complaint.

284. This Count, which alleges unjust enrichment, is asserted against Defendant UPS on behalf of Plaintiffs and the Class. Plaintiffs allege this Count in the alternative to Plaintiffs' claims for breach of contract under Counts VI-VII.

4 **285.** As alleged herein, UPS imposed an improper and fraudulent surcharge
5 for aviation fuel on shipments that UPS transported by ground, using no aviation
6 fuel whatsoever, despite Plaintiffs' and the Class' purchase of air services. UPS
7 engaged in these actions wrongfully, without Plaintiffs' consent, and has done so to
8 its advantage and benefit. UPS has no entitlement to the higher surcharges for
9 aviation fuel it charged for Plaintiffs' and the Class's ground shipments.

10 **286.** As a direct and proximate result of UPS's conduct, UPS has been
11 unlawfully and unjustly enriched in an amount to be proven at trial.

COUNT XIII

UNJUST ENRICHMENT WITH RESPECT TO AIR SERVICE CLAIM

14 **287.** Plaintiffs, individually and on behalf of the putative Class, restate and
15 incorporate herein the preceding paragraphs of the Complaint.

16 **288.** This Count, which alleges unjust enrichment, is asserted against
17 Defendant UPS on behalf of Plaintiffs and the Class. Plaintiffs allege this Count in
18 the alternative to Plaintiffs' claims for breach of contract under Count VIII.

19 **289.** As alleged herein, UPS engaged in the Air-In-Ground program in
20 which it fraudulently substituted the less expensive ground shipping service despite
21 the fact that Plaintiffs and the Class had purchased more expensive air shipping
22 services. UPS engaged in these actions wrongfully, without Plaintiffs' consent, and
23 has done so to its advantage and benefit. UPS has no entitlement to the higher air
24 service fees it charged for Plaintiffs' and the Class's ground shipments.

25 **290.** As a direct and proximate result of UPS's conduct, UPS has been
26 unlawfully and unjustly enriched in an amount to be proven at trial.

PRAYER FOR RELIEF

28 | WHEREFORE, Plaintiffs and the Class respectfully request that the Court

1 enter judgment against Defendant UPS and Defendants DOES as follows:

2 a. Certify the proposed Class under F.R.C.P. 23(a) and 23(b);

3 b. Award actual and compensatory damages;

4 c. Award treble damages pursuant to 18 U.S.C. § 1964(c);

5 d. Order preliminary and permanent injunctive relief enjoining

6 UPS, its partners, joint ventures, subsidiaries, agents, servants, and employees, and

7 all persons acting under, in concert with it directly or indirectly, or in any manner,

8 from in any way engaging in the practices set forth herein;

9 e. Award appropriate attorneys' fees, pursuant to 18 U.S.C. § 1964

10 and other applicable statutes;

11 f. Award costs of suit incurred herein;

12 g. Award punitive damages, to be awarded to Plaintiffs and each

13 Class member;

14 h. Award both pre- and post-judgment interest on any amounts

15 awarded;

16 i. Order an imposition of a constructive trust upon all monies and

17 assets Defendants have acquired as a result of their unfair practices;

18 j. Order such other and further relief as the Court deems just and

19 proper under the circumstances.

Jury Trial Demanded

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury on all issues so triable.

25 Dated: October 19, 2010

/s/ Peter J. McNulty
Peter J. McNulty SBN 89660
MCNULTY LAW FIRM
827 Moraga Dr.
Los Angeles, CA 90049
Telephone: (310) 471-2707

1 FAX: (310) 472-7014
2 Email: peter@mcnultylaw.com
3 Attorney for Plaintiffs

4 Matthew J. Geragos SBN 153390
5 GERAGOS LAW GROUP
6 150 S. Los Robles Ave., Ste. 665
7 Pasadena, CA 91101
8 Telephone: (626) 449-8700
9 FAX: (626) 449-8702
10 Email: matthew@geragosalaw.com
11 Attorney for Plaintiffs

12 Stephen C. Neal SBN 170085
13 Scott D. Devereaux SBN 146050
14 Kathleen H. Goodhart SBN 165659
15 COOLEY LLP
16 Five Palo Alto Square
17 3000 El Camino Real
18 Palo Alto, CA 94306
19 Telephone: (650) 843-5152
20 FAX: (650) 857-0663
21 Email: nealsc@cooley.com
22 Email: devereauxsd@cooley.com
23 Email: kgoodhart@cooley.com
24 Attorneys for Plaintiffs

25 Kirk D. Tresemer Colorado Bar #8502
26 Darren A. Natvig Colorado Bar #35491
27 IRWIN & BOESEN, P.C.
28 4100 E. Mississippi Ave., Ste. 1900
Denver, CO 80246
Telephone: (303) 999-9999
FAX: (303) 320-1915
Email: ktresemer@coloradolawyers.com
Email: dnatvig@coloradolawyers.com
Attorneys for Plaintiffs

29 Paul R. Alanis SBN 56423
30 Loren S. Ostrow SBN 77665
31 150 S. Los Robles Ave., Suite 665
32 Pasadena, CA 91101
33 Telephone: (626) 356-1188
34 FAX: (626) 345-1164
35 Email: palanis@a-olaw.com
36 Email: lostrow@a-olaw.com
37 Attorneys for Plaintiffs

38 Jonathan H. Waller Alabama Bar #
0725-L53J
39 G. Douglas Jones Alabama Bar # 3880-
S82G

1 Kirk D. Smith Alabama Bar # 6682-S76K
2 HASKELL SLAUGHTER YOUNG &
3 REDIKER, LLC
4 1400 Park Place Tower
5 2001 Park Place North
6 Birmingham, AL 35203
7 Telephone: (205) 834-9897
8 FAX: (205) 324-1133
9 Email: jhw@hsy.com
10 Email: gdj@hsy.com
11 Email: kds@hsy.com
12 Attorneys for Plaintiffs
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1197222 v1/SF